

No. 12227

United States
Court of Appeals
for the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Appellant,

vs.

CECELIA J. WILSON,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Idaho, Eastern Division

FILED

MAY 31 1949

PAUL P. O'BRIEN,



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THE HISTORY OF THE

REIGN OF

THE

QUEEN

OF GREAT BRITAIN

AND

OF

IRELAND

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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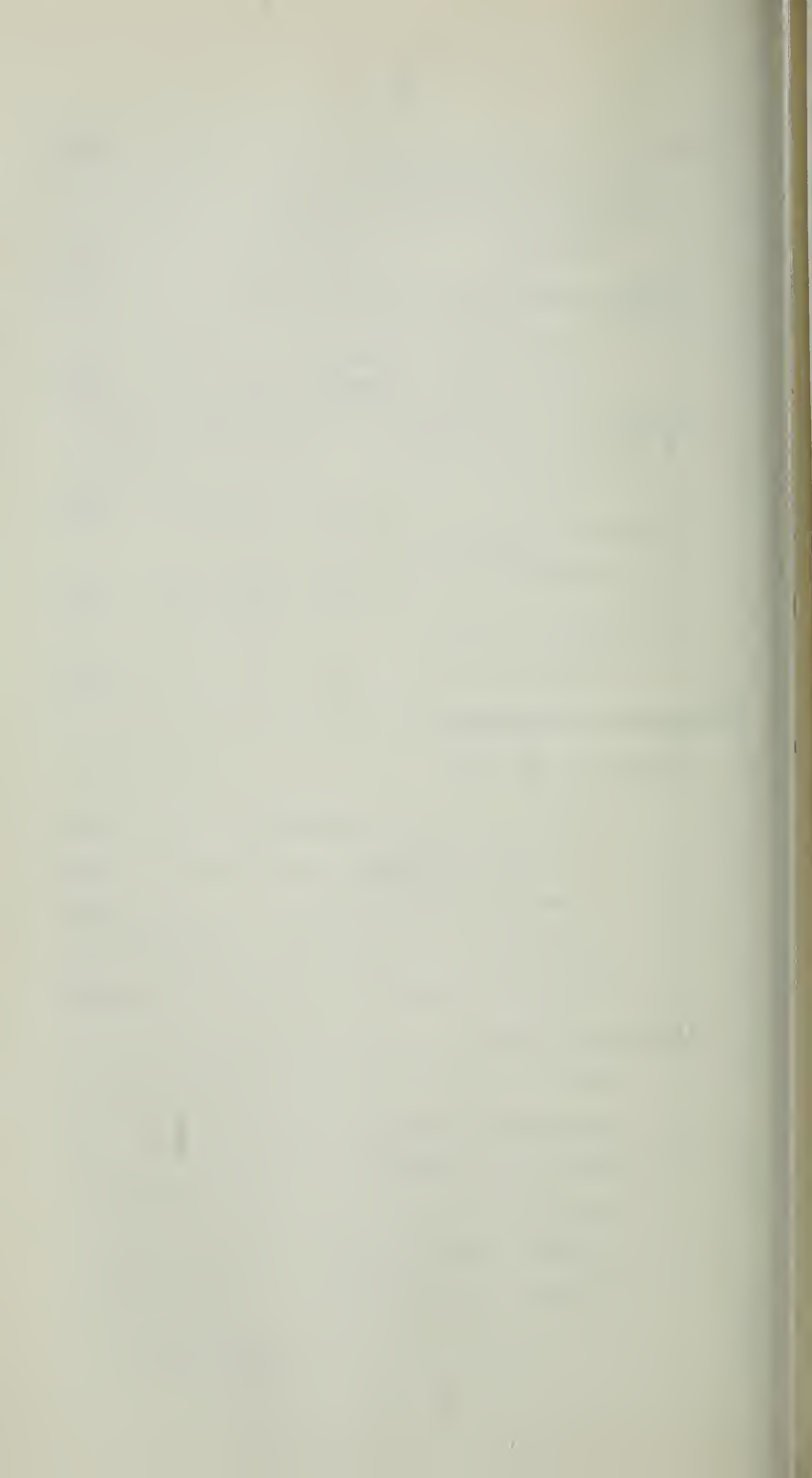
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NAMES AND ADDRESSES OF ATTORNEYS

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J. L. EBERLE,

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Attorneys for Defendant and Appellee.

In the District Court of the United States for the
District of Idaho, Eastern Division

No. 1463

CECELIA J. WILSON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
corporation of New York,

Defendant.

COMPLAINT

Plaintiff Complains of Defendant and Alleges:

I.

That Plaintiff is a citizen and resident of the State of Idaho; that defendant is a New York Corporation; that the matter in controversy exceeds exclusive of interest and costs, the sum of \$3,000.00.

II.

That on or about the 19th day of May, 1928, the defendant issued to Harry H. Wilson, now deceased, its certain policy of insurance, being Policy No. 102 55 251 the policy insuring the insured for \$5,000.00, payable to his beneficiary upon proof of his death, and \$10,000, or double the face of said policy if death resulted from accident; that said policy provided for the payment of an annual premium which was paid each and every year by the deceased up until the time of his death on the 8th day of April, 1947; that the defendant is familiar with all the terms and provisions of said policy and is familiar with the fact of the death of the deceased and the circumstances surrounding the same.

III.

That there was and is due to the plaintiff, the beneficiary under said policy, the sum of Five Thousand Dollars, with interest thereon at six per cent per annum from the 8th day of April, 1947, by reason of the death of the deceased, her husband, caused by accidental means, which sum the defendant has at all times refused to pay. [1*]

Wherefore, plaintiff prays that she have and recover judgment against the defendant in the sum of \$5,000.00 with interest thereon at six per cent per annum from the 8th day of April, 1947, for all costs of suit herein expended and plaintiff prays for general relief.

/s/ B. W. DAVIS,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 7, 1947. [2]

[Title of District Court and Cause.]

MOTIONS TO DISMISS, AND FOR MORE DEFINITE STATEMENT OR BILL OF PARTICULARS

The defendant moves the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.
2. That on account of the insufficiency of the facts in the complaint in the above-entitled cause it is im-

* Page numbering appearing at foot of page of original certified Transcript of Record.

possible to fully or properly answer the same without greater particularity as to the nature and character of the claims of the plaintiff, and therefore this defense moves this honorable Court under Rule 12 (a) of the Federal Rules of Civil Procedure for an order requiring plaintiff to make a more definite statement of the nature of his claim or provide defendant with a bill of particulars as to certain matters in the complaint in the following respects:

(a) That the pertinent terms of the policy are not set forth and it is impossible to ascertain whether plaintiff's claim is within the terms of such policy.

(b) That it is impossible to ascertain what proof, if any, of death plaintiff has made.

(c) That it is impossible to ascertain the accidental means relied upon by plaintiff in connection with her allegations that death was caused by accidental means. [3]

Defendant further moves this honorable Court that if such more definite statement of the nature of plaintiff's claims or bill of particulars be not filed within ten days from the entry of the order herein and copies served upon defendant's counsel within such time, or being so filed and served are incomplete, insufficient, evasive or not responsive, the complaint as amended be dismissed at plaintiff's costs; and further, if any matters are included in such said particulars and not relied upon at the trial of plaintiff, the defendant recover the costs and expenses incurred in preparing to meet the allegations contained in said parts not used.

Defendant further moves that the time within

which defendant may file an answer or other pleadings or otherwise move with respect to the complaint be extended until twenty-five days after the bill of particulars herein mentioned is served upon defendant's counsel or twenty days after final decision of this motion is made.

That each of the above and foregoing motions is a separate motion and each of such motions is made upon the files and records in the above-entitled cause.

/s/ J. L. EBERLE,

/s/ B. S. VARIAN,

/s/ Illegible,

Attorneys for Defendant.

[Endorsed]: Filed Nov. 26, 1947. [4]

[Title of District Court and Cause.]

MINUTES OF THE COURT OF JAN. 13, 1948

After hearing respective counsel on Motion to Dismiss, for More Definite Statement or for Bill of Particulars, the Court announced that all Motions will be denied, and defendant will be given 20 days to Answer.

Jan. 13, 1948.

[Title of District Court and Cause.]

ANSWER

For Answer to the Complaint of the Plaintiff Herein:

I.

Defendant admits that plaintiff is a citizen and resident of the State of Idaho; that defendant is a

New York corporation; that the matter in controversy exceeds, exclusive of interest and cost, the sum of Three Thousand Dollars (\$3,000.00); that Harry W. Wilson died on or about April 8, 1947; that on or about May 19, 1928, defendant issued to said Harry H. Wilson an insurance policy numbered 10255251, but denies that said policy of insurance contains any terms of provisions other than those contained in the policy of insurance in writing, delivered by defendant to said Harry H. Wilson.

II.

Denies each and every of the allegations in said Complaint and each and every paragraph therein contained excepting as hereinbefore specifically admitted.

/s/ J. L. EBERLE,

/s/ B. S. VARIAN,

/s/ Illegible,

Attorneys for Defendant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Jan. 31, 1948. [5]

[Title of District Court and Cause.]

MINUTES OF THE COURT OF MAR. 17, 1948.

This cause came on regularly for trial, B. W. Davis representing the plaintiff and J. L. Eberle the defendant.

It was stipulated by respective counsel that the premiums were paid and the insurance policy was in full force at the time of the death of Harry H. Wilson.

It was stipulated by respective counsel that the testimony given in case No. 1462 by Drs. O. F. Call, W. W. Brothers and Melvin Graves would also run to this cause of action.

It was stipulated that the depositions of Dr. Joseph Beeman, Dr. F. A. Pittenger, Dr. James L. Stewart and Dr. O. F. Swindell be copied into the record.

The Court ordered that argument be submitted on briefs, the plaintiff being granted 20 days for opening brief, defendant 20 days thereafter to reply, and plaintiff 15 days to reply to reply brief. The time for filing briefs to commence the date of filing of the transcript of testimony.

[Title of District Court and Cause.]

MOTION TO AMEND ANSWER

Comes now the defendant above named and moves the Court that it may be granted leave to amend its answer herein by adding thereto the following paragraph, namely:

III.

That plaintiff cannot recover because the death of said Harry H. Wilson resulted in such manner as to be within the following exclusions of said policy, to wit:

“DOUBLE INDEMNITY

“The Double Indemnity provided on the first page hereof shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury

effected solely through external, violent and accidental means and occurred within ninety days after such injury.

“Double Indemnity shall not be payable if the Insured’s death resulted from self-destruction, whether sane or insane; from the taking of poison or inhaling of gas, whether voluntary or otherwise; from committing an assault or felony; from war or any act incident thereto; from engaging in riot or insurrection; from participation as a passenger or otherwise in aviation or aeronautics; or directly or indirectly, from infirmity of mind or body, from illness or disease, or from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury. The Company shall have the right and opportunity to examine the body, and to make an autopsy unless prohibited by law.

“Double Indemnity shall not apply to the Temporary Insurance or to the Paid-up Insurance provided herein under “Surrender Values,” or to any Dividend Additions provided under ‘Participation in Surplus—Dividends.’

“The total premium stated on the first page hereof includes a Quar. annual premium of \$1.35 for the Double Indemnity Benefit.”

Dated September 22, 1948.

/s/ J. L. EBERLE,

/s/ B. S. VARIAN,

Attorneys for Defendant. [7]

[B. W. Davis Letterhead]

September 28, 1948

Richards & Haga, Attorneys,
Boise, Idaho.

Attention: Mr. J. L. Eberle

In re: Wilson v. New York Life Ins. Co.

Dear Mr. Eberle:

I have your letter of the 22nd inst. and it is not difficult for me to answer you at all.

If the amendment you seek to make does you no benefit and in no way hurts me, I am perfectly willing for you to make it. If not and it helps you any, I do not want to agree.

Inasmuch as it has been pleaded in the other case, I would not want you to be placed in an adverse position if it really makes any difference, so I guess you may file it, but please do it at once and do not ask me to do it again. I am sure I made a tremendous mistake in this case by following the suggestions of you fellows.

Yours sincerely,

/s/ B. W. DAVIS.

D/g

[Endorsed]: Filed Sept. 29, 1948. [8]

[Title of District Court and Cause.]

ORDER TO AMEND ANSWER

On motion of defendant to amend its answer herein, and no objections have been offered thereto by plaintiff, it is hereby Ordered that the answer of the defendant herein be, and hereby is, amended by adding to such answer the following paragraph, to wit:

That plaintiff cannot recover because the death of said Harry H. Wilson resulted in such manner as to be within the following exclusions of said policy, to wit:

“DOUBLE INDEMNITY

“The Double Indemnity provided on the first page hereof shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury.

“Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane; from the taking of poison or inhaling of gas, whether voluntary or otherwise; from committing an assault or felony; from war or any act incident thereto; from engaging in riot or insurrection; from participation as a passenger or otherwise in aviation or aeronautics; or directly or indirectly, from infirmity of mind or body, from illness or disease, or from any bacterial infection other than bacterial infection occurring in consequence of acciden-

tal and external bodily injury. The Company shall have the right and opportunity to examine the body, and to make an autopsy unless prohibited by law.

“Double Indemnity shall not apply to the Temporary Insurance or to the Paid-up Insurance provided herein under “Surrender Values,” or to any Dividend Additions provided under ‘Participation in Surplus—Dividends.’

“The total premium stated on the first page hereof includes a Quar. annual premium of \$1.35 for the Double Indemnity Benefit.”

Dated September 29th, 1948.

/s/ CHASE A. CLARK,
District Judge.

[Endorsed]: Filed Sept. 29, 1948. [9]

[Title of District Court and Cause.]

OPINION—February 2, 1949

Ben. W. Davis, Esq., of Pocatello, Idaho, Attorney for Plaintiff.

A. L. Merrill, Esq., Pocatello, Idaho; J. L. Eberle, Esq., Boise, Idaho, Attorneys for the Defendant.

Clark, District Judge.

The Plaintiff Cecilia J. Wilson brought this action to recover for the alleged accidental death of her husband, Harry Wilson.

Harry Wilson, the deceased, was a resident of the State of Idaho at the time the defendant New York Life Insurance Company, a corporation of New York, on or about the 19th day of May, 1928, issued

its certain policy of insurance, being policy No. 10255251, the policy insuring the insured for \$5,000.00 payable to his beneficiary upon proof of his death and \$10,000.00 or double the face of the policy if death resulted from accident. This action is for the recovery of the double indemnity of \$5,000.00 for the alleged accidental death.

The policy provided for double indemnity if "the death of the Insured resulted directly and independently of all other causes from bodily injury affected solely through external, violent and accidental means * * *." "Double indemnity shall not be payable if the insured's death resulted * * * directly or indirectly from illness or diseases or from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury * * *"

The insured died on the 8th day of April, 1947, from "acute pulmonary embolism." This is defined at page 12 of the [10] transcript of the testimony, by Doctor O. F. Call, attending physician at the time of Mr. Wilson's death, as a "foreign substance or piece of a clot flowing in the blood stream which goes through the heart, through the pulmonary artery to such a place that it can't go any farther and lodges in the pulmonary artery or branch of it. It can be a clot of blood, a fatty or foreign substance."

The circumstances preceding Mr. Wilson's death as disclosed by the evidence, are as follows: He was in ordinary good health of the average man; he was about sixty years of age; he was troubled to some extent by high blood pressure. He had undergone an

operation some years ago for a bowel obstruction; the record does not disclose when this operation was performed but it was prior to an operation for hernia that was performed some four years prior to his death. On the morning of April 7, 1947, he was again operated upon for recurrent inguinal hernia. Immediately following the operation he was returned to his room in the hospital in apparently good condition. After the operation on the morning of April 7, opiates and sedatives were administered, which were a part of standard and recognized treatment. The opiotes so administered caused deep heavy snoring, choking and coughing and although Mr. Wilson was a heavy snorer when sleeping under natural conditions, this medication caused the choking and coughing and snoring to become more violent, causing the pulmonary embolism from which death resulted at 5 o'clock a.m. April 8, 1947, about twenty hours after the operation. The result of the administration of the opiates was entirely unforeseen and unexpected; there was nothing to indicate, at the time of their administration, that he would develop this extraordinary condition snoring or heavy breathing and the coughing and choking causing the embolism. Doctor Call testified that in his experience in operations this condition that developed in reference to the snoring, choking and breathing was most extraordinary and not to be expected or foreseen; the [11] record discloses the following questions and answers in the testimony of Doctor Call:

“Q. I call your attention to the definition in Webster's International Dictionary of accident; that de-

finer an accident as "a befalling; an event that takes place without one's foresight or expectation, an undesigned, sudden and unexpected event; chance; contingency, often an undesigned and unforeseen occurrence of an afflictive or unfortunate character, a casualty, a mishap, as, to die of accident." Now, Doctor, I will ask you if the event of the patient's death under the circumstances, in your opinion, was an event that took place without foresight and expectation?

A. It was.

Q. Was it undesigned, sudden and unexpected?

A. It was.

Q. Was it a chance? A. It was.

Q. Due to contingency? A. It was.

Q. Was it an undesigned and unforeseen occurrence of an afflictive or unfortunate character?

A. It was.

Q. Was it a casualty? A. It was.

Q. Was it a mishap? A. It was.

Q. Did he die in your opinion, by accident?

A. He did.

Q. Now, with reference to this condition, this unexpected condition that occurred there with reference to the choking and snoring, was that an event that took place without foresight and expectation?

A. That's right.

Q. Was it undesigned? A. It was. [12]

Q. Was it a chance? A. It was.

Q. A contingency? A. Yes, sir.

Q. Was it an unforeseen and undesigned occurrence of an afflictive or unfortunate character?

A. It was.

Q. And was it a mishap?

A. Yes, sir, certainly.

Q. In your opinion it was the direct cause of the man's death. The main cause, and the principal and moving cause of the man's death?

A. Yes, sir.

The deceased died unexpectedly, there was nothing in his operation, and he gave no indicative history or evidence that the calamity that befell him was likely to happen.

Plaintiff having established the death was accidental the burden shifts to the defendant and it must allege and prove that recovery is barred by the limitations qualifying the general clause hereinbefore set forth.

“Where the insurer seeks to avoid liability by reason of an alleged breach of the condition of the policy, the burden rests upon it to show such breach; and, where it seeks to avoid liability on the ground that the accident or injury is within one of the exceptions in the policy, the burden rests upon it to prove facts bringing the case within the exception.”
O'Neil v. New York Life Insurance Co., 152 Pac (2) 707 at page 711.

In meeting this burden it must be remembered that the limitation clause is to be construed most favorable to the insured. The rule is that insurance policies must be construed strongly against the insurer and in favor of the insured and that where there are two constructions that may be placed upon [13] the meaning of an accident policy, one of which will permit the insured to recover and the other not permit-

ting such recovery that the policy must be construed so as to permit recovery. The most widely cited rule is the one set forth by Ex-President and Former Chief Justice Taft, (Court of Appeals 6th Circuit) in the case of *Manufacturer's Accident Indemnity Co. v. Dorgan* 58 Fed. 945, he said: "It is a well-settled rule in the construction of insurance policies of this character, which the insured accepts for the purpose of covering all accidents, to construe all language used to limit the liability of the company, strongly against the company. Policies are drawn by the legal advisers of the company, who study with care the decisions of the courts, and, with those in mind, attempt to limit as narrowly as possible the scope of the insurance. It is only a fair rule, therefore, which courts have adopted, to resolve any doubt or ambiguity in favor of the insured and against the insurer." This statement has been cited with approval by the Court of appeals of this, the Ninth Circuit in the case of *Jensma v. Sun Life Assurance Co., of Canada et al.*, 64 Fed(2) page 457.

Recovery in this case depends on the limitation in the policy hereinbefore set forth. The term *Accidental* means in some jurisdictions has been held to clearly limit the policy's meaning to cause alone, however the better rule and the rule followed in this jurisdiction is that the term "accidental means" and the term "accidental results" and "accidental death" are regarded as legally synonymous. *Jensma v. Sun Life Assurance Co., of Canada et al.*, supra. *Ranert v. Loyal Protective Insurance Co.* (1940) 61 Idaho

677, 106 Pac 2nd 1015; *O'Neil v. New York Life Insurance Co.*, *supra*.

We have here a result that was unforeseen, the opiates were introduced into the body of the insured without any thought that such a result would follow, the result being unforeseen and wholly unexpected and unanticipated. [14]

Death is inevitable, every man lives more happily and secure if he feels that he has insurance to take care of those who are near and dear to him, after he has departed this life. It is well known, as suggested in the case of *Ranert v. Loyal Protective Insurance Co.*, *supra*, that the ordinary man is not versed in the construction of contracts. He simply says to the life insurance agent, "I want this security for my family" he does not prepare, nor does he have his lawyer prepare the written contract; he pays the money for this insurance. The contract is prepared beforehand by the insurer. I think it can be said without contradiction that the provisions of the policy are not discussed, they simply tell the agent the protection they desire. The policy is all written out in printed form and following the main provisions of the policy the limitations are provided. In other words, the first part of the policy gives and the second part of the policy takes away, and the ordinary person who is not trained to interpret contracts is generally not in a position to understand the details, terms and meanings of the limitations. In fact, as is so often said, the insured seldom sees the policy until it has been issued and delivered to him and then after he receives it he puts it in his desk or safe and the

first time it is read is by his beneficiaries after his death. Many of its terms and all of its defenses and super limitations are difficult to understand. If justice is to be done the courts must adopt a rule of construction in favor of the insured to accomplish the purpose for which the insurance was taken out and for which the premiums were paid.

This Court follows that rule not only because it is the rule in this jurisdiction but because it is the just rule.

The Court is of the opinion that the defendant has failed to bring itself within the exception relied upon to defeat recovery and is further of the opinion that the result that followed the administration of the opiates was not natural or probable and should not reasonably have happened and under all the circumstances the result was tragically out of proportion [15] to the trivial cause, and that the plaintiff is entitled to recover under the terms of the policy.

The plaintiff's counsel may prepare the necessary findings, conclusions and judgment to conform with this opinion, copy will be served on counsel for the defendant and the original presented to the Court for approval.

[Endorsed]: Filed Feb. 3, 1949. [16]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having heretofore been submitted to the Court without a jury by agreement of counsel for the respective parties upon issues framed by plaintiff's complaint and the Answer of the defendant as amended, and evidence having been submitted on behalf of plaintiff and defendant and written briefs having been prepared and filed by the respective parties and the Court having carefully considered said briefs and the evidence in said cause and having heretofore, on the 2nd day of February, 1949, made and filed its written opinion, the Court now makes the following

FINDINGS OF FACT

I.

That plaintiff, at all times from and after the filing of her complaint, up to and including the time that said matter was fully submitted to the Court, was a resident of the State of Idaho and during said time the defendant was a New York corporation and that the sum in controversy exceeds exclusive of interest and costs, \$3,000.00.

II.

That the defendant, New York Life Insurance Company, a corporation of New York, on or about the 19th day of May, 1928, issued to Harry H. Wilson, then living and a resident of the State of Idaho, its certain policy of insurance, being Policy 10255251, payable to his beneficiary upon proof of his death

\$5,000.00 and \$10,000 or double the face of said policy if death resulted from accident. That said [17] policy was issued for a premium to be paid yearly and that all of the premiums due under and by virtue of the terms of said policy were paid by the insured during his life time.

III.

That Harry H. Wilson died of accident or by accidental death on the 8th day of April, 1947.

IV.

That prior to the accidental death of Harry H. Wilson, who was past sixty-one years of age, he was in the ordinary good health of the average man.

V.

That he was operated on for hernia on the 7th day of April, 1947, and that prior thereto he was given a careful examination by a skilled physician and surgeon, who was a man of broad experience in his profession and who was a competent and experienced surgeon. That there was no indication that the patient at that time was not in good physical condition and the proper subject of a simple hernia operation.

VI.

That the patient appeared normal in every respect following said operation; did not suffer any shock and did not die as a result of said hernia operation.

VII.

That the death of Harry H. Wilson was caused by choking or coughing or violent snoring or by choking, coughing and violent snoring, which caused and re-

sulted in an embolism, causing the death of the insured.

VIII.

That the insured was given sedatives and opiates which caused the violent coughing, choking and snoring and which unexpectedly and accidentally caused the death of the said insured. [18]

IX.

That the coughing, choking and snoring of the patient was extremely violent, extraordinary, not to have been foreseen and entirely beyond the experience of his attending physician in previous and similar conditions.

X.

That the administration of opiates and sedatives was a reasonable and ordinary procedure to be followed by the attendant physician; that the result thereof, causing the violent choking, snoring and coughing was tragically out of proportion to the trivial cause and was an accident and resulted in death by accident.

XI.

That the opiates and sedatives administered to the insured prior to his death, were externally administered.

XII.

That the facts fail to disclose and the defendant did not prove under Paragraph III of its Amended Answer that the exclusions of the policy as therein set out were the proximate cause or that the deceased died directly or indirectly from infirmity of mind or body, from illness or diseases or from any bacterial

infection, other than bacterial infection occurring in consequence of accidental and external bodily injury.

XIII.

That the plaintiff has sustained the material allegations of her complaint, that the death of the deceased was accidental and that the defendant has failed to sustain the allegation of its affirmative defense that the death of Harry H. Wilson resulted in such manner as to be within the exclusions of the said Policy.

CONCLUSIONS OF LAW

I.

That Plaintiff having proven and established the accidental death of the deceased within the terms of the insurance policy described in plaintiff's complaint, is entitled to a judgment as [19] prayed for.

II.

That the defendant has failed to establish facts showing that the death of the deceased was within the exclusions of its policy.

III.

That the plaintiff is entitled to a judgment in accordance with the prayer of her complaint for \$5,000.00 with interest thereon at 6% per annum, the legal rate in the State of Idaho, from the 8th day of April, 1947.

Dated this 21st day of March, 1949.

/s/ CHASE A. CLARK,
Federal District Judge.

[Endorsed]: Filed Mar. 21, 1949. [20]

In the United States District Court, District of
Idaho, Eastern Division

No. 1463

CECELIA J. WILSON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
corporation of New York,

Defendant.

JUDGMENT

The above-entitled cause having been tried and submitted to the Court sitting without a jury by agreement of counsel for the respective parties, upon issues framed by plaintiff's complaint and the Answer of the defendant as amended, the plaintiff appearing in person and by her attorney, B. W. Davis of Pocatello, Idaho, and the defendant appearing by its counsel, J. L. Eberle of Boise, Idaho, and plaintiff and defendant having introduced evidence and the Court having taken the matter under advisement and having carefully considered the evidence and the written briefs submitted by the respective parties in support of their contentions and the Court having heretofore filed and entered a written Opinion and made and filed Findings of Fact and Conclusions of law;

It Is Ordered, Adjudged and Decreed that the plaintiff have and recover of and from the defendant, the sum of \$5,000.00 with interest thereon at 6% per annum from the 8th day of April, 1947, amounting to

\$553.33, a total judgment of \$5,553.33, to which shall be added \$21.20, plaintiff's costs of suit when taxed herein, and that plaintiff may have execution therefor.

Dated this 21st day of March, 1949.

/s/ CHASE A. CLARK,
Federal District Judge.

[Endorsed]: Filed March 21, 1949. [21]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice Is Hereby Given that New York Life Insurance Company, a corporation, defendant above named, hereby appeals to the Circuit Court of Appeals of the Ninth Circuit from the final judgment entered in this action on the 21st day of March, 1949.

/s/ J. L. EBERLE,

/s/ B. S. VARIAN,

/s/ DALE O. MORGAN,

Attorneys for Defendant, New York Life Insurance Company, a Corporation.

[Endorsed]: Filed March 28, 1949. [22]

[Title of District Court and Cause.]

**SUPERSEDEAS BOND UPON APPEAL TO
CIRCUIT COURT OF APPEALS**

Know All Men By These Presents that New York Life Insurance Company, a corporation, as Principal, and American Bonding Company, a corporation, of Baltimore, Maryland, as Surety, are held and firmly bound unto Cecelia J. Wilson, plaintiff above named, in the sum of Six Thousand Dollars (\$6,000.00) to be paid to the said Cecelia J. Wilson or her attorney, successors or assigns, to which payment we bind ourselves, our successors and assigns, jointly and severally.

Sealed with our seals and dated this 28th day of March, 1949.

Whereas on the 21st day of March, 1949, in the above-entitled action in the District Court of the United States for the District of Idaho, Southern Division, between Cecelia J. Wilson, plaintiff above named, and said New York Life Insurance Company, a corporation, defendant above named, a judgment was rendered against said defendant and the said defendant has duly filed a notice of appeal from said judgment.

Now, the condition of this bond is that if said New York Life Insurance Company, a corporation, shall prosecute his appeal with effect and satisfy the said judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed and satisfied in full or such modification of the judgment and such costs, interest, and

damages as the Appellate Court may adjudge and award then this obligation to be void, otherwise to remain in full force and effect.

NEW YORK LIFE INSURANCE
COMPANY, CORPORATION,

By /s/ J. L. EBERLE,
/s/ B. S. VARIAN,
/s/ DALE O. MORGAN,
Its Attorneys.

AMERICAN BONDING
COMPANY,

By /s/ HERBERT H. EBERLE,
Attorney in Fact.

Countersigned by:

(Seal) /s/ HERBERT H. EBERLE,
Resident Agent.

[Endorsed]: Filed March 28, 1949. [23]

[Title of District Court and Cause.]

MOTION AND ORDER STAYING PROCEED-
INGS PENDING APPEAL

The defendant herein, New York Life Insurance Company, a corporation, having filed herein a supersedeas bond, executed by itself as principal and American Bonding Company, a corporation, as surety, in the penal sum of Six Thousand Dollars (\$6,000.00) said defendant moves that said supersedeas bond be approved and that the execution and enforcement of the judgment entered herein on March 21, 1949, be stayed until the final dis-

position of the appeal taken by the said defendant therefrom to the Circuit Court of Appeals for the Ninth Circuit.

March 28th, 1949.

/s/ J. L. EBERLE,

/s/ B. S. VARIAN,

/s/ DALE O. MORGAN,

Attorneys for Defendant.

ORDER

On motion, and good cause being shown therefor, it is hereby Ordered that the supersedeas bond dated March 28th, 1949, filed herein by defendant New York Life Insurance Company, a corporation, and executed by said defendant as principal and American Bonding Company, a corporation, as surety, in the penal sum of Six Thousand Dollars (\$6,000.00) be and hereby is approved and the execution and the enforcement of the judgment made and entered herein on March 21, 1949, be and hereby is stayed until the final disposition of the appeal taken by said defendant therefrom to the Circuit Court of Appeals for the Ninth Circuit.

March 28th, 1949.

/s/ CHASE A. CLARK,

District Judge.

[Endorsed]: Filed March 28, 1949. [24]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

New York Life Insurance Company, a corporation, appellant herein, designates the complete record and all proceedings and evidence in the above-entitled action to be contained in the record on appeal and the Clerk will please prepare such record on appeal herein, including, but not limited to, the following:

1. Complaint filed November 7, 1947.
2. Motion to dismiss and for more definite statement or bill of particulars.
3. Minute entry denying motions filed January 13, 1948.
4. Answer of defendant, filed January 31, 1948.
5. Minute entry of March 17, 1948.
6. Motion to amend answer.
7. Order amending answer filed September 29, 1948.
8. Transcript of the evidence filed August 19, 1948.
9. All exhibits.
10. Opinion of Court dated February 2, 1949, filed Feb. 3, 1949.
11. Findings of fact and conclusions of law, dated Feb. 21, 1949.
12. Judgment dated February 21, 1949.
13. Notice of appeal.
14. Supersedeas bond.
15. Motion and order staying proceedings pending appeal.

16. This designation.
17. Statement of Points.

March 28th, 1949.

/s/ J. L. EBERLE,

/s/ B. S. VARIAN,

/s/ DALE O. MORGAN,

Attorneys for Appellant, New York Life Insurance Company, a Corporation.

[Endorsed]: Filed March 28, 1949. [25]

[Title of District Court and Cause.]

STATEMENT OF POINTS

Appellant states that the points upon which it intends to rely on the appeal in the above-entitled action are as follows and that it deems the entire record on appeal as necessary for consideration of the points so to be relied upon, to wit:

1. That the court erred in finding and holding that the death of the insured, Harry H. Wilson, resulted directly and independently of all other causes from bodily injury, effected solely through external, violent and accidental means.

2. The court erred in not finding and holding that the death of the insured, Harry H. Wilson, resulted directly or indirectly from infirmity of mind or body, from illness or disease.

3. The court erred in finding and holding that the death of the insured, Harry H. Wilson, was caused by choking or coughing or violent snoring, extraordinary, not to have foreseen, beyond

the experience of attending physicians, and resulted in an embolism, causing the death of the insured, the same being unsupported by, and contrary to, the evidence, said insured having had previous operations, and such snoring, coughing and choking as he had being normal, no different than ordinary, and the physical condition, habits and tendencies of insured fully known to attending physician.

4. The court erred in finding and holding that the insured, Harry H. Wilson, was in ordinary good health of the average [26] man, the same being unsupported by, and contrary to, the evidence; the fact being as shown by such evidence, that said insured had a bodily infirmity and disease and certain habits and tendencies well known to the attending physician.

5. That the court erred in finding and holding that prior to the hernia operation, said insured Harry H. Wilson, was given a careful examination and that there was no indication that the patient was not in good physical condition, appeared normal following the operation, did not suffer any shock, and did not die as a result of said hernia operation, the same being unsupported by, and contrary to, the evidence, particularly in that said insured had previously had several operations and that his physical condition was such that death resulted from, or was contributed to by, infirmity of mind or body, from illness or disease, and not directly and independently from bodily injury, solely through accidental means.

6. That the court erred in finding and holding

that insured was given sedatives and opiates which caused violent coughing, choking and snoring which unexpectedly and accidentally caused his death, and he died of accident or by accidental means, the same being unsupported by, and contrary to, the evidence in that the evidence showed that he did not die of accident or by accidental means, the snoring, coughing, and choking referred to following relaxation from an opiate or sedative was normal in the case of the insured, no different than under ordinary conditions, which was well known to the attending physician and not unexpected or unforeseeable.

7. That the court erred in finding and holding that the administration of opiate or sedative caused violent choking, snoring or coughing tragically out of the proportion to the trivial cause and was accidental, resulting in the death of the insured, [27] the same being unsupported by, and contrary to, the evidence and particularly in that, according to the evidence, the snoring, coughing and choking of the insured was normal, usual and not disproportionate, well known to the attending physician and did not result in the death of insured.

8. The court erred in failing and declining to hold, inaccordance with the evidence, as follows:

(a) In not finding and holding that there was nothing unexpected in the snoring and coughing of the insured as part of the post-operative procedure and that the same was not unusual or unforeseen.

(b) In not finding and holding that the insured

had an existing diseased venous system and bodily infirmity at the time of the hernia operation and that the attending physician had full knowledge of such physical condition and of insured's habits.

(c) In not finding and holding that insured's death was the probable result of an existing bodily infirmity and disease.

(d) In not finding and holding that the insured had no idiosyncrasies or hypersusceptibility unknown to himself or his physician.

(e) In not finding and holding that the opiate or sedative involved produced relaxation in accordance with the only purpose and object thereof and caused no injury whatsoever to insured.

(f) In not finding and holding that plaintiff did not show that the opiate or sedative in fact caused any bodily injury to insured.

(g) In failing to find and hold that an opiate or a sedative as proper post-operative procedure allayed pain and relaxed body, thereby inducing sleep, had such an effect and no other, and that there was no uncommon or unusual reaction to such opiate by reason of any allergy, hypersusceptibility or any other cause. [28]

(h) In failing to find and hold that the sedative or opiate did not cause snoring, coughing or choking, but only induced sleep and when insured slept he always had certain snoring habits, which in the case at bar were no different from those of any other time.

(i) In not finding and holding that insured's ac-

tions during operation and subsequent thereto were no different than in ordinary life.

(j) In not finding and holding that post-operative pulmonary embolism is foreseeable, expected, anticipated, and the natural and probable result of surgical procedure, particularly in the case of said insured.

9. The court erred in concluding that the death of the insured was accidental within the terms of the policy referred to in plaintiff's complaint and that plaintiff was entitled to judgment, such conclusion not being sustained by, and contrary to, the evidence which clearly showed that plaintiff did not prove insured received a bodily injury which was effected solely through external, violent and accidental means, that such injury was a direct cause of the death of insured, independently of all other causes, and that the same was not the result directly, or indirectly, from infirmity of mind or body or from illness or disease.

10. The court erred in entering judgment in favor of the plaintiff and against the defendant in the sum of \$5,553.33, plus costs, under date of March 21, 1949.

/s/ J. L. EBERLE,

/s/ B. S. VARIAN,

/s/ DALE O. MORGAN,

Attorneys for Defendant, New York Life Insurance Company, a Corporation.

[Endorsed]: Filed March 28, 1949. [29]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of Idaho,

County of Ada—ss.

Irene R. Pinsonault of said county, being duly sworn, deposes and says: That she is a citizen of the United States, over twenty-one (21) years of age, and not a party to the above-mentioned action; and is employed in the office of J. L. Eberle, B. S. Varian and Dale O. Morgan, attorneys at law, Boise, Idaho, as a stenographer, and that on the 28th day of March, 1949, she deposited in the United States Postoffice at Boise, Ada County, State of Idaho, an envelope duly addressed by United States mail to B. W. Davis, Attorney for Cecelia J. Wilson, at Pocatello, Idaho, said envelope containing the following papers entitled in the above action: Notice of Appeal to Circuit Court of Appeals; Motion and Order Staying Proceedings Pending Appeal; Statement of Points; Designation of Record on Appeal; Supersedeas Bond upon Appeal to Circuit Court of Appeals; and that she paid the postage fee thereon in advance and that there is a regular communication by the United States mails between said postoffice of deposit thereof, as aforesaid, and said place of residence.

/s/ IRENE R. PINSONAULT.

Subscribed and sworn to before me this 28th day of March, 1949.

[Seal] /s/ J. L. EBERLE,

Notary Public for Idaho.

[Endorsed]: Filed March 28, 1949. [30]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers:

1. Complaint.
2. Motions to Dismiss, and for More Definite Statement or Bill of Particulars.
3. Minutes of the Court of Jan. 13, 1948.
4. Answer (With Affidavit of Mailing attached).
5. Minutes of the Court of Mar. 17, 1948.
6. Motion to Amend Answer (Letter dated 9/28/48 from B. W. Davis to Richards & Haga attached).
7. Order to Amend Answer.
8. Transcript of the Evidence.
9. Exhibits: Plff's Ex. 1—New York Life Ins. Policy. Plff's Ex. 2—Photostatic copy letter dated 8/27/47 from Chairman, Committee on Death Benefits to B. W. Davis. Plff's Ex. 3—Deposition of Dr. O. F. Call with photographic copy of hospital record. Deft's Ex. 4—Photographic copy of Hospital record—H. H. Wilson.
10. Opinion.

11. Findings of Fact and Conclusions of Law.
12. Judgment. [31]
13. Notice of Appeal to Circuit Court of Appeals.
14. Superseadeas Bond Upon Appeal to Circuit Court of Appeals.
15. Motion and Order Staying Proceedings Pending Appeal.
16. Designation of Record on Appeal.
17. Statement of Points.
18. Affidavit of Mailing of Appeal Papers and that portion of the original files as designated by the parties and as are necessary to the appeal under Rule 75 (RCP).

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 12th day of April, 1949.

[Seal]

ED. M. BRYAN,
Clerk. [32]

In the District Court of the United States, in and
for the District of Idaho, Eastern Division

No. 1463

CECELIA J. WILSON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation, of New York,

Defendant.

TRANSCRIPT

This matter was tried before the Honorable
Chase A. Clark, sitting without a jury, at Pocatello, Idaho, on March 17, 1948, at 10 o'clock a.m.

Appearances: Ben W. Davis, Pocatello, Idaho,
Attorney for the Plaintiff. J. L. Eberle, Boise,
Idaho; A. L. Merrill, Pocatello, Idaho, Attorneys
for the defendant. [1*]

March 17, 1948

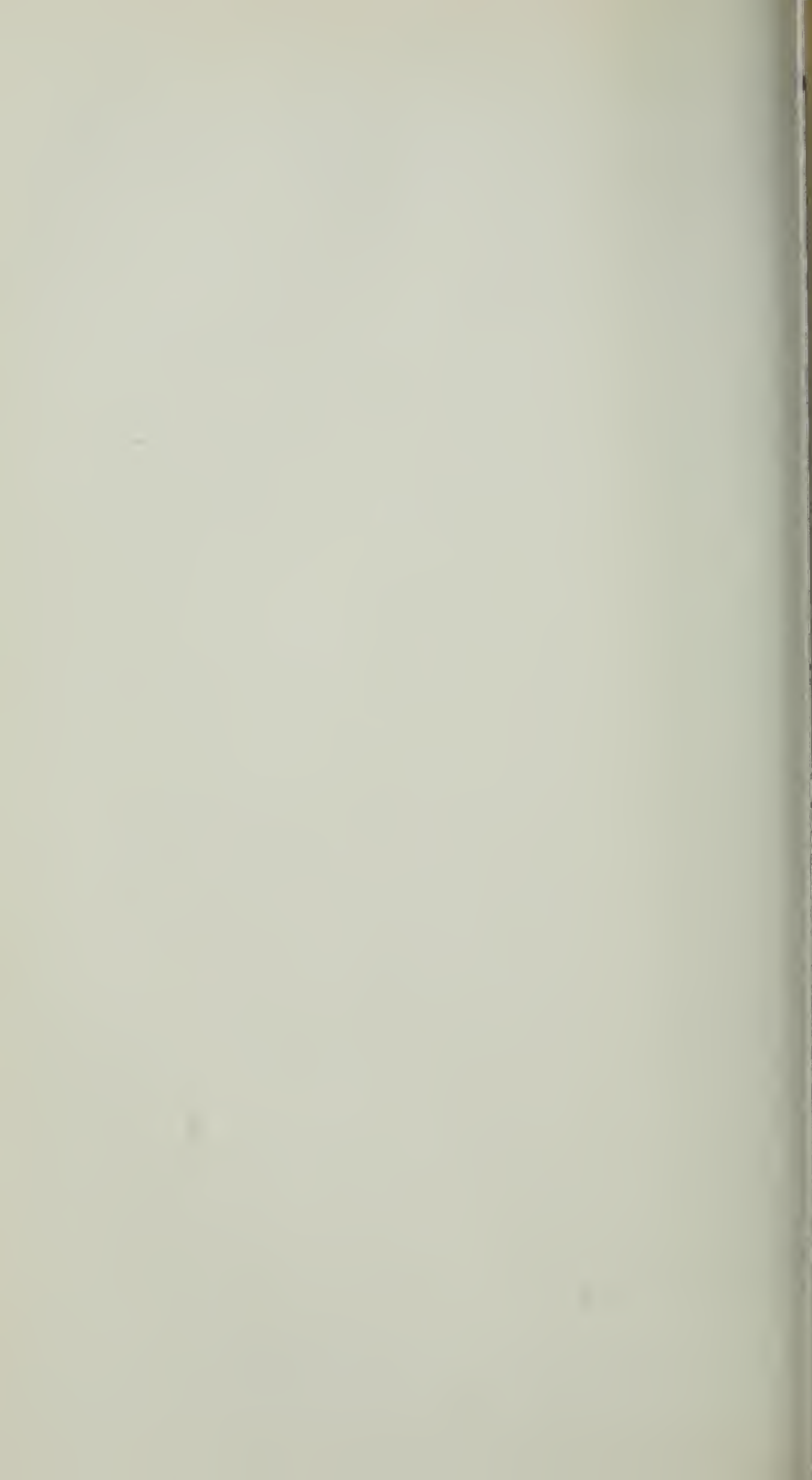
Mr. Davis: Now, I offer in evidence exhibit numbered one, which is the policy of insurance involved here.

The Court: Do you have any objection?

Mr. Eberle: None.

The Court: It may be admitted.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.



NEW YORK LIFE
INSURANCE COMPANY
A MUTUAL COMPANY

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
MAR 17 1949

PAUL P. O'BRIEN

CLERK

1463

AGREES TO PAY

PLAINTIFF'S EXHIBIT No. 1

MAR 17 1949

ADMITTED

o CECILIA J., WIFE OF THE INSURED ***

Beneficiary

(with right on the part of the Insured to change the Beneficiary in the manner provided herein)

*** FIVE THOUSAND ***
(THE FACE OF THIS POLICY)

Dollars

upon receipt of due proof of the death of

*** HARRY H. WILSON ***

the Insured.

*** TEN THOUSAND ***
(DOUBLE THE FACE OF THIS POLICY)

Dollars

If such death resulted from accident as defined under "Double Indemnity" on the second page hereof and subject to the provisions therein set forth.

Either such sum will be increased by any outstanding dividend additions and dividend deposits as provided herein.

This contract is made in consideration of the payment in advance of the sum of \$ 48.25, the receipt of which is hereby acknowledged, constituting the first premium and maintaining this Policy for the period terminating on the NINETEENTH day of AUGUST Nineteen Hundred and TWENTY-EIGHT, and of a like sum on said date and every THREE calendar months thereafter during the life of the Insured.

The premium paying period may be shortened by application of dividend additions and dividend deposits as provided herein.

This Policy takes effect as of the NINETEENTH day of MAY Nineteen Hundred and TWENTY-EIGHT which day is the anniversary of the Policy.

THE BENEFITS AND PROVISIONS printed or written by the Company on the following pages are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

In Witness Whereof the NEW YORK LIFE INSURANCE COMPANY has caused this contract

to be signed this NINETEENTH day of MAY Nineteen Hundred and TWENTY-EIGHT

Frederick M. Johnson
Secretary

Lawrence P. Kinglake
President

925-71
O.L.
O.L.

Alfred J. Kinglake
Registrar

No. 42
Examined

Insurance Payable at Death. Premiums Payable during Life unless Dividends Applied to Shorten Premium Paying Period. Double Indemnity for Fatal Accident. Annual Participation in Surplus.

DOUBLE INDEMNITY

The Double Indemnity provided on the first page hereof shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury.

Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane, from the taking of poison or inhaling of gas, whether voluntary or otherwise; from committing an assault or felony; from any act incident thereto; from engaging in riot or insurrection; from participation as a passenger or otherwise in aviation, aeronautics; or directly or indirectly, from infirmity of mind or body, from illness or disease, or from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury. The Company shall have the right and opportunity to examine the body, and to make an autopsy unless prohibited by law.

Double Indemnity shall not apply to the Temporary Insurance or to the Paid-up Insurance provided herein under "Surrender Values", or to any Dividend Additions provided under "Participation in Surplus—Dividends".

The total premium stated on the first page hereof includes a QUARTER annual premium of \$ 1.55 for Double Indemnity Benefit.

PARTICIPATION IN SURPLUS—DIVIDENDS

The proportion of divisible surplus accruing upon this Policy shall be ascertained annually. Beginning at the end of the second insurance year, and on each anniversary thereafter, such surplus as shall have been apportioned by the Company to this Policy shall at the option of the Insured be either

- (a) Paid in cash; or
- (b) Applied toward payment of premiums; or
- (c) Applied to purchase a participating paid-up addition to the sum insured (herein referred to as Dividend Addition); or
- (d) Left to accumulate at such rate of interest as the Company may declare on funds so held, but at a rate never less than three per cent compounded and credited annually. Such accumulated dividends (herein referred to as Dividend Dividends) may be withdrawn in cash by the Insured on any anniversary of the Policy or shall be payable at the maturity of the Policy to the person entitled to its proceeds.

If no option is selected, the dividend will be applied to the purchase of a dividend addition to the sum insured. The Insured may surrender any dividend addition for cash at any time not later than three months after any default in the payment of premium, and the cash value thereof shall never be less than the original cash dividend.

DIVIDENDS MAY BE APPLIED TO DECREASE NUMBER OF PREMIUM PAYMENTS OR MATURE POLICY AS AN ENDOWMENT

Whenever the cash value of the Policy including the cash value of any dividend additions and dividend deposits shall equal the net single premium at the attained age of the Insured for a fully paid participating Policy of the same kind and amount as this Policy, calculated on the same basis as the premium on this Policy, the Company, upon written request of the Insured, will indorse this Policy as fully paid, whereupon the payment of premium will be discontinued; or, whenever said cash value shall equal the face amount of this Policy, the Company, upon due surrender of the Policy, will pay the face amount of the Policy in cash, less any indebtedness to the Company.

MISCELLANEOUS BENEFITS

Assignment.—Any assignment of this Policy must be made in duplicate and one copy filed with the Company at its Home Office. The Company assumes no responsibility for the validity of any assignment.

Change of Beneficiary.—The Insured may from time to time change the beneficiary, unless otherwise provided by indorsement on this Policy or unless there be an existing assignment of this Policy. Every change of beneficiary must be made by written notice to the Company at its Home Office accompanied by the Policy for indorsement of the change, and by the Company, and unless so indorsed the change shall not take effect. After such indorsement the change will retroact to and take effect as of the date the Insured signed said written notice of change whether the Insured be living at the time of such indorsement or not, but without prejudice to the Company on account of any payment made by it before receipt of such written notice at its Home Office. In the event of the death of any beneficiary before the Insured the interest in such beneficiary shall vest in the Insured, unless otherwise provided herein.

Grace.—If any premium is not paid on or before the day it falls due the policy-holder is in default; but a grace period of one month (not less than thirty days) will be allowed for the payment of every premium after the first, during which the insurance continues in force. If death occurs within the period of grace the overdue premium will be deducted from the amount payable hereunder.

Interest Allowed at Settlement of Death Claims.—Interest will be allowed on the proceeds of the Policy payable as a death claim from date of receipt of due proof of death at any office of the Company until the date settlement is made at the Home Office. Interest shall be at the rate declared by the Company on such funds, but at a rate not less than three per cent per annum.

Reinstatement.—This Policy may be reinstated at any time within five years after any default, upon written application by the Insured and presentation at the Home Office of evidence of insurability satisfactory to the Company, upon payment of overdue premiums with five per cent interest thereon from their due date. Any indebtedness to the Company at date of default must be paid or reinstated with interest thereon in accordance with the loan provisions of the Policy.

Privilege of Change to Other Plans of Insurance.—At any time before default in payment of premium, provided the Insured is then less than 55 years of age, the Insured may, without medical re-examination, exchange this Policy for a Policy upon any plan of insurance having a higher rate of premium issued by the Company at the time this Policy was issued for the same amount as this Policy and containing the same Double Indemnity but without Disability Benefits. Such exchange shall be effective upon surrender of this Policy and the payment of the difference in premiums with interest at the rate of six per cent per annum from the due date of each premium to the date of exchange; allowance will be made for any larger cash dividends on the new plan. The new Policy will take effect as of the date of this Policy and the premium will be at the rate which would have been charged if the Policy had been originally issued on the new plan.

Residence, Travel and Occupation.—This Policy is free of conditions as to residence, travel, occupation, and military or naval service, except as provided herein under Double Indemnity.

Rights of Insured.—The Insured, during his lifetime, and without the consent of the beneficiary, may receive every benefit, exercise every right and enjoy every privilege conferred upon the Insured by this Policy, unless otherwise provided by indorsement hereon.

OPTIONAL METHODS OF SETTLEMENT

The Insured, or in case the Insured shall not have done so, the beneficiary after the Insured's death, may, by written notice to the Company at its Home Office, make the proceeds of this Policy, in whole or in part, payable under one of the following options. Any such election or any change in election shall not take effect until indorsed on the Policy by the Company at its Home Office. The optional methods of settlement are available whether such proceeds are payable as a death claim or as a claim for an Endowment, or upon surrender of the Policy for its cash value, provided the instalment or interest payment to the beneficiary is not less than \$10.

Option 1.—The proceeds in whole or in part may be left with the Company subject to withdrawal at any time on demand in sums of not less than one hundred dollars. The Company will credit interest annually on the proceeds so left with such rate as it may each year declare on such funds, and guarantees that the rate shall be not less than three per cent.

Option 2.—The proceeds in whole or in part may be made payable in equal annual, semi-annual, quarterly or monthly instalments for a fixed period as may be agreed upon, in accordance with the following table.

Option 3.—The proceeds in whole or in part may be made payable in equal annual, semi-annual, quarterly or monthly instalments for a fixed period of five, ten or twenty years, as may be agreed upon, and for the remaining lifetime of the payee, in accordance with the following table.

Option 4.—The proceeds in whole or in part may be left with the Company at interest until the death of the payee. The Company will pay interest thereon annually, semi-annually, quarterly or monthly, as may be agreed upon, at such rate as the Company may declare each year on such funds, and guarantees that the interest per one thousand dollars of the proceeds shall be not less than \$30 when paid annually, \$14.89 when paid semi-annually, \$7.42 when paid quarterly, or \$2.47 when paid monthly.

Option 5.—The proceeds in whole or in part may be left with the Company at interest and paid in equal annual, semi-annual, quarterly or monthly instalments of such amount as may be agreed upon until the entire proceeds left with the Company, including interest thereon as provided in Option 1, have been paid, provided that the fixed amount payable each year shall be not less than five per cent of the original proceeds left with the Company.

The first instalment under Options 2 and 3 will be payable on the date when the proceeds of the Policy become due, the instalment payment on each anniversary of the first payment will be increased by such additional interest, in excess of three per cent per annum, as the Company may declare on such funds for that year. The additional interest under Option 2 will be calculated on the unpaid instalments commuted at three per cent per annum, and under Option 3 on the unpaid instalments for the fixed period selected, commuted at three per cent per annum.

When the proceeds of the Policy become payable the Company will deliver to each payee a certificate evidencing the rights and benefits of such payee under the option selected.

At the death of any payee any unpaid sum left with the Company under Options 1, 4 or 5 with accrued interest to date of payment, or the commuted value at three per cent of any unpaid instalments under Option 2, or the commuted value at three per cent of any unpaid instalments for the fixed period selected under Option 3, will be paid in one sum to the executors or administrators of the payee, unless otherwise agreed in writing.

The Insured may direct in writing that the benefits under the above options shall not be transferable nor subject to commutation or incumbrance during the lifetime of the payee.

MONTHLY AND ANNUAL PAYMENTS FOR EACH \$1,000 OF PROCEEDS OF POLICY

Semi-annual and quarterly instalments are 50.37% and 25.28% respectively of the annual instalment under Option 2, and not less than these respective percentages under Option 3.

OPTION 2			OPTION 3—LIFE INCOME TO PAYEE WITH INCOME GUARANTEED FOR															
Age of Payee When Proceeds Become Payable	Monthly Payment	Annual Payment	5 Years Certain		10 Years Certain		20 Years Certain		Age of Payee When Proceeds Become Payable	5 Years Certain		10 Years Certain		20 Years Certain				
			Monthly Payment	Annual Payment	Monthly Payment	Annual Payment	Monthly Payment	Annual Payment		Monthly Payment	Annual Payment	Monthly Payment	Annual Payment	Monthly Payment	Annual Payment			
10 and under	342.86	\$507.39	\$3.81	\$44.85	\$3.75	\$44.21	\$3.58	\$42.20	48	\$5.36	\$62.61	\$5.17	\$60.51	\$4.65	\$54.20			
11	28.99	343.23	3.83	45.07	3.77	44.41	3.59	42.36	49	5.45	63.63	5.24	61.40	4.65	54.70			
12	22.06	261.19	3.85	45.30	3.79	44.62	3.61	42.54	50	5.54	64.70	5.32	62.33	4.69	55.24			
13	17.91	211.99	3.87	45.54	3.81	44.84	3.62	42.71	51	5.64	65.83	5.41	63.30	4.74	55.77			
14	15.14	179.22	3.89	45.78	3.83	45.07	3.64	42.90	52	5.74	67.02	5.49	64.30	4.78	56.30			
15	13.16	155.83	3.91	46.03	3.85	45.29	3.65	43.08	53	5.85	68.26	5.58	65.35	4.83	56.84			
16	11.68	138.30	3.94	46.27	3.87	45.53	3.67	43.27	54	5.97	69.57	5.68	66.44	4.87	57.37			
17	10.33	124.69	3.96	46.52	3.89	45.76	3.69	43.47	55	6.09	70.95	5.78	67.57	4.92	57.90			
18	9.61	113.81	3.98	46.77	3.91	45.99	3.70	43.66	56	6.22	72.40	5.88	68.75	4.96	58.43			
19	8.86	104.92	4.00	47.02	3.93	46.23	3.72	43.87	57	6.35	73.93	5.98	69.98	5.00	58.95			
20	8.24	97.53	4.02	47.28	3.95	46.48	3.74	44.07	58	6.49	75.53	6.09	71.24	5.05	59.46			
21	7.71	91.29	4.05	47.55	3.97	46.74	3.76	44.29	59	6.64	77.22	6.21	72.55	5.09	59.96			
22	7.26	85.94	4.07	47.84	4.00	47.01	3.78	44.52	60	6.80	78.99	6.32	73.91	5.13	60.45			
23	6.87	81.32	4.10	48.14	4.02	47.29	3.80	44.75	61	6.96	80.85	6.44	75.31	5.17	60.92			
24	6.53	77.29	4.12	48.45	4.05	47.59	3.82	45.00	62	7.13	82.81	6.57	76.75	5.20	61.37			
25	6.23	73.74	4.15	48.77	4.07	47.90	3.84	45.25	63	7.31	84.87	6.70	78.23	5.24	61.80			
26	5.96	70.59	4.18	49.12	4.10	48.22	3.86	45.51	64	7.51	87.03	6.83	79.75	5.27	62.20			
27	5.73	67.78	4.21	49.47	4.13	48.56	3.89	45.79	65	7.71	89.31	6.96	81.30	5.30	62.59			
28	5.51	65.25	4.25	49.85	4.16	48.91	3.91	46.07	66	7.92	91.69	7.09	82.89	5.33	62.94			
29	5.32	62.98	4.28	50.24	4.19	49.28	3.94	46.37	67	8.14	94.19	7.23	84.50	5.36	63.27			
30	5.15	60.91	4.32	50.65	4.23	49.66	3.96	46.67	68	8.37	96.77	7.37	86.14	5.38	63.57			
31	4.99	59.04	4.35	51.08	4.26	50.07	3.99	46.99	69	8.61	99.56	7.51	87.79	5.40	63.84			
32	4.84	57.32	4.39	51.53	4.30	50.49	4.02	47.32	70	8.86	102.43	7.65	89.46	5.42	64.08			
33	4.71	55.75	4.43	52.01	4.33	50.93	4.05	47.66	71	9.13	105.44	7.79	91.12	5.44	64.29			
34	4.59	54.30	4.48	52.50	4.37	51.39	4.08	48.01	72	9.40	108.57	7.93	92.79	5.45	64.48			
35	4.47	52.97	4.52	53.02	4.42	51.87	4.11	48.38	73	9.69	111.84	8.07	94.44	5.47	64.64			
36	4.37	51.74	4.57	53.56	4.46	52.38	4.14	48.75	74	9.99	115.25	8.21	96.06	5.48	64.77			
37	4.27	50.59	4.62	54.13	4.51	52.90	4.17	49.14	75	10.30	118.78	8.34	97.65	5.48	64.88			
38	4.18	49.53	4.67	54.73	4.55	53.45	4.21	49.54	76	10.62	122.44	8.47	99.21	5.49	64.97			
39			4.73	55.36	4.60	54.03	4.24	49.96	77	10.95	126.22	8.59	100.71	5.50	65.05			
40	4.78	56.02	4.65	54.63	4.28	50.38	4.28	50.38	78	11.29	130.13	8.71	102.14	5.50	65.11			
41	4.61	54.71	4.71	55.26	4.32	50.82	4.31	50.82	79	11.64	134.14	8.82	103.51	5.50	65.15			
42	4.49	53.43	4.77	55.91	4.35	51.27	4.35	51.27	80	12.00	138.25	8.92	104.80	5.51	65.19			
43	4.97	58.19	4.83	56.60	4.39	51.73	4.39	51.73	81	12.36	142.44	9.02	106.01	5.51	65.21			
44	5.04	58.99	4.89	57.31	4.43	52.20	4.43	52.20	82	12.73	146.70	9.11	107.12	5.51	65.23			
45	5.12	59.83	4.95	58.06	4.48	52.69	4.48	52.69	83	13.09	151.00	9.19	108.14	5.51	65.24			
46	5.19	60.71	5.02	58.84	4.52	53.18	4.52	53.18	84	13.46	155.34	9.26	109.06	5.51	65.25			
47	5.27	61.64	5.09	59.66	4.56	53.68	4.56	53.68	85	13.83	159.67	9.32	109.89	5.51	65.25			

and over

LOAN VALUES

After three full years' premiums have been paid and before default in the payment of premium, the Company will advance to the Insured on the sole security of this Policy, as duly evidenced in writing, an amount which will interest shall not exceed the Cash Surrender Value. Interest on the loan will be at the rate of six per cent per annum payable annually on the anniversary of the Policy. If interest is not paid when due, it shall be added to the principal. All or any part of the indebtedness may be repaid at any time while the Policy is in force. Failure to repay such indebtedness or to pay interest will not avoid the Policy, but whenever the amount of the total indebtedness equals the Cash Surrender Value, the Policy shall become void one month after the Company shall have mailed notice to the last known address of the Insured and of the assignee of record, if any.

TABLE OF LOAN VALUES FOR EACH \$1,000 OF THE FACE AMOUNT			
Years' Premiums Paid	Loan Value	Years' Premiums Paid	Loan Value
3	\$40	15	\$280
4	55	16	300
5	75	17	321
6	94	18	342
7	115	19	362
8	135	20	383
9	157	21	403
10	179	22	423
11	199	23	444
12	219	24	464
13	239	25	483
14	259		

SURRENDER VALUES

In event of default in payment of premium after three full years' premiums have been paid, the following benefits shall apply:

(a) **Temporary Insurance**—Insurance for the face of the Policy plus any dividend additions and any dividend deposits and less the amount of any indebtedness hereon, shall, upon expiry of the period of grace, be continued automatically as Temporary Insurance as from the date of default for such term as the Cash Surrender Value less any indebtedness hereon will purchase as a net single premium at the attained age of the Insured, according to the American Table of Mortality and interest at 3 per cent. This Temporary Insurance will be without participation in surplus.

(b) **Participating Paid-up Insurance**—Within three months after such default, but not later, the insured may surrender this Policy and elect in place of such Temporary Insurance to have this Policy indorsed for the amount of Participating Paid-up Insurance which the Cash Surrender Value at date of default less any indebtedness hereon, will purchase as a net single premium at the attained age of the Insured at the date of default according to the American Table of Mortality and interest at 3 per cent. The Insured may obtain a loan on such Paid-up Insurance or surrender it within one month after any anniversary for its cash surrender value.

(c) **Cash Surrender Value**—If the Policy shall not have been indorsed for Participating Paid-up Insurance, the Insured, within three months after such default, but not later, may surrender this Policy and all claims thereunder and receive its Cash Surrender Value as at date of default less any indebtedness hereon. The Cash Surrender Value shall be the reserve on the face amount of the Policy at date of default, omitting fractions of a dollar a thousand of insurance, and the reserve on any outstanding dividend additions and any outstanding dividend deposits, and less a surrender charge for the third to the ninth years, inclusive, of not more than one and one-half per cent of the face of the Policy. The reserve shall be computed on the basis of the American Table of Mortality and interest at 3 per cent.

Cash Surrender Value of Fully Paid Policy—If this Policy shall have become fully paid by its terms, the Insured may surrender the Policy and all claims thereunder within one month after any anniversary of the policy and receive its cash surrender value less any indebtedness hereon. Such cash surrender value shall be computed on the basis described under (c) above.

The values in the "Table of Guaranteed Surrender Values" are computed in accordance with the above provisions, on the basis of \$1,000 of face amount, assuming that premiums have been duly paid for the number of years stated, that there is no indebtedness to the Company, that there are no outstanding dividend additions nor dividend deposits, and after deducting the surrender charge, if any.

TABLE OF GUARANTEED SURRENDER VALUES				
After Policy has been in force	Cash Surrender Value for each \$1,000 of the Face Amount	Paid-up Life Insurance for each \$1,000 of the Face Amount	Temporary Insurance from date of default	
			Years	Days
3	\$43	\$86	3	365
4	59	116	5	91
5	80	154	6	290
6	100	188	7	350
7	122	225	9	4
8	144	261	10	30
9	167	297	10	323
10	190	332	11	191
11	211	361	11	341
12	233	390	12	91
13	254	418	12	171
14	275	445	12	231
15	297	471	12	271
16	319	496	12	281
17	341	521	12	281
18	363	545	12	271
19	384	568	12	241
20	406	590	12	201
21	428	611	12	151
22	449	632	12	101
23	471	652	12	31
24	492	671	11	331
25	512	689	11	261
Years				

Ed. June '16. O. L. 1,000. 42.

Values for later years will be computed on the same basis and will be furnished on request.

Any loan under this Policy may be covered by term insurance as follows:

PREMIUMS FOR EACH \$100 OF TERM INSURANCE							
Insured's Attained Age	Premium for One Year	Insured's Attained Age	Premium for One Year	Insured's Attained Age	Premium for One Year	Insured's Attained Age	Premium for One Year
16	\$0.73	26	\$0.79	41	\$0.98	54	\$1.87
16	0.74	26	0.80	42	0.99	54	1.79
17	0.74	30	0.81	43	1.01	59	1.91
18	0.76	31	0.82	44	1.04	57	1.98
19	0.76	32	0.83	45	1.07	58	2.01
20	0.78	33	0.84	46	1.11	59	2.00
21	0.78	34	0.85	47	1.18	60	2.07
22	0.78	35	0.86	48	1.20	61	2.18
23	0.77	36	0.87	49	1.16	62	2.01
24	0.77	37	0.89	50	1.33	63	2.18
25	0.79	38	0.90	51	1.40	64	2.45
26	0.78	39	0.93	52	1.48		
27	0.79	40	0.93	53	1.87		

For periods of less than one year, the premium shall be at the rate of one-tenth of the one year's premium for each month and fraction of a month

Age.—If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Payment of Premiums.—All premiums are payable on or before their due date at the Home Office of the Company to an authorized agent of the Company, but only in exchange for the Company's official premium receipt signed by the President, Vice-President, Second Vice-President, Secretary, or the Treasurer of the Company, and countersigned by the person receiving the premium. No person has any authority to collect a premium unless he then holds said official premium receipt. The premium may be made payable annually, semi-annually or quarterly in advance at the Company's respective rates for such modes of payment, and the mode of payment may be changed by agreement in writing and not otherwise. The payment of the premium shall not maintain the Policy in force beyond the date when the next payment becomes due, except as to the benefits provided for herein after default in premium payment.

Indebtedness.—Any indebtedness to the Company against this Policy will be deducted in any settlement thereof.

Self-Destruction.—In event of self-destruction during the first two insurance years, whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company and no more.

The Contract.—The Policy and the application therefor, copy of which is attached hereto, constitute the entire contract. All statements made by the Insured shall, in absence of fraud, be deemed representations and not warranties, and no statement shall avoid the Policy or be used in defense to a claim under it, unless it is contained in the written application. A copy of the application is indorsed upon or attached to this Policy when issued. No agent is authorized to make or modify this contract; or to extend the time for the payment of premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements. All benefits under this Policy are payable at the Home Office of the Company in the City of New York.

Incontestability.—This Policy shall be incontestable after two years from its date of issue except for non-payment of premium and except as to provisions and conditions relating to Double Indemnity.

NOTE.—NO CHANGE OF BENEFICIARY SHALL TAKE EFFECT UNLESS INDORSED ON THIS POLICY BY THE COMPANY AT THE HOME OFFICE

DATE OF REQUEST	BENEFICIARY	INDORSED BY

APPLICATION TO THE NEW YORK LIFE INSURANCE COMPANY — Part I

Harry H. Wilson

(Print name in full)

Residence State <i>Iowa</i> County <i>Des Moines</i> Town <i>Des Moines</i> Street <i>1000 1/2 Fairfield</i> No. <i>300</i> R.F.D. Name of firm or employer <i>Fargo Wilson & Co.</i> Former Residence	Place of Business State <i>Iowa</i> County <i>Des Moines</i> Town <i>Des Moines</i> Street <i>1000 1/2 Fairfield</i> No. <i>300</i> R.F.D. Name of firm or employer <i>Fargo Wilson & Co.</i> Former place of business	Present Occupation <i>Buyer, Dept Store</i> State exact duties in full Other Occupations (if any) <i>None</i> Former firm or employer	Born at <i>Des Moines</i> on <i>15</i> day of <i>November</i> Married <input checked="" type="checkbox"/> Not-married (Write the last one) Send all communications to <i>Residence</i> Place of Business (Write the last one)
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The answer required unless change has taken place within past two years.

APPLY TO THE NEW YORK LIFE INSURANCE COMPANY FOR INSURANCE AS FOLLOWS:

Sum to be insured, \$ <i>5000.00</i>	Premiums how payable, <i>Quarterly</i>	Age nearest birthday <i>34</i>
Plan of Insurance <i>Ordinary</i>	with <input checked="" type="checkbox"/> without <input type="checkbox"/> { <i>Stability Benefit, 1% Monthly</i> <i>Stability Benefit, Increasing Income</i> <i>Double Indemnity Benefit</i> <small>(Write out benefits not desired)</small>	Date Policy <i>date of this application</i> as of <i>date Policy is issued</i> <small>(Write the last one)</small>
Dividend to be: <input checked="" type="checkbox"/> Paid in cash; <input type="checkbox"/> Applied toward payment of premiums; <input type="checkbox"/> Applied to purchase additional paid-up insurance;		
Note—Option applies only to Endowment policies containing the Accelerative Endowment option.		
I designate as Beneficiary to receive the proceeds of policy in event of death, as I reserve the right to change the Beneficiary to time, <i>Cecilia J. Wilson</i>		
Who resides at	Relationship to me <i>Wife</i>	
a The following is all the insurance I now have on my life: <i>10000 from ...</i>		
b The insurance for which I am now applying is not intended to take the place of insurance carried with this or any other Company. If it is, give particulars:		
Of the insurance on my life the amount which includes benefits in event of total disability is \$ <i>none</i>		
No Company has declined to issue insurance on my life or issued or offered to issue insurance on my life differing from the insurance applied for, except as follows: (If none, say none)		

ADDITIONS OR AMENDMENTS (For Home Office use only)

It is mutually agreed as follows: 1. That the insurance hereby applied for shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant has not been consulted or been treated by any physician since his medical examination; provided, however, that if the applicant, at the time of making this application, pays the agent in cash the full amount of the first premium for the insurance applied for in Question, and if the agent declares in this application and receives from the agent a receipt therefor on the receipt form which is attached hereto, the Company, after medical examination and investigation, shall be satisfied that the applicant was, at the time of making this application, insurable and entitled under the Company's rules and standards to the insurance, on the plan and for the amount applied for in Question, and 2, at the Company's published premium rate corresponding to the applicant's age, then said insurance shall take effect and be in force under and subject to the provisions of the policy applied for from and after the time this application is made, whether a policy is delivered to and received by the applicant or not. 2. That a receipt on the form attached as a coupon to this application for the policy receipt the agent is authorized to give for any payment made before the delivery of the policy. 3. That only the President, Vice-President, a Second Vice-President, a Secretary or the Treasurer of the Company can make, modify or discharge contracts, or alter the Company's rights or requirements; that notice to or knowledge of the soliciting agent or the Medical Examiner is not to be given, and knowledge of the Company, and that neither one of them is authorized to accept risks or to pass upon insurability, and that by signing and accepting said policy, any additions or amendments hereto which the Company may make and refer to in Question above titled "Additions or Amendments" are hereby ratified.

Witnessed at *Des Moines* this *15* day of *May* 19*28*

Signature of the person applying for insurance *Harry H. Wilson*

Agent *Harry H. Wilson*

(Write the name in full)

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NEW YORK LIFE INSURANCE COMPANY

HARRY H. WILSON

No. 10 255 251

Amount \$ 5,000.

QUARTER Annual Premium \$ 48.25

Payable on the 19TH day of MAY

AUGUST, NOVEMBER, FEBRUARY

Wm G Woodburn
Pocatello

IDAHO BR.

Notice: It is not necessary for the Insured or the Beneficiary to employ the agency of any person in collecting the insurance under this Policy, or in receiving any of its benefits. Time and expense will be saved by writing direct to the Home Office, 346 Broadway, New York City.

Insurance payable at death.

Premiums payable during life unless dividends applied to shorten premium paying period.

Double Indemnity for fatal accident.

Annual Participation in Surplus.

925-71

Mr. Davis: It is denied in the answer that the premiums were paid on that and that it was in full force and effect. I understand now that counsel will agree that the premiums were paid and that it was in full force and effect at the time of the death of Mr. Wilson.

Mr. Eberle: I stipulate that the premiums were paid and that the defendant paid to the plaintiff the face amount of the policy with the reservation of liability as to the double indemnity only in accordance with the letter to Mr. Davis under date of August 27, 1947, which is marked exhibit "2." The face amount of the policy being \$5000.00 which I think covers the effectiveness of the policy.

The Court: It may be so understood and exhibit "2" will be admitted.

PLAINTIFF'S EXHIBIT No. 2

August 27, 1947.

Mr. B. W. Davis
Attorney at Law
Ross-Davis Building
Pocatello, Idaho

In re: Policy No. 10 255 251 DB No. 623 237
Harry H. Wilson—Deceased

Dear Sir:

We acknowledge the receipt of your letter of August 12 and we have given further consideration to your client's claim for the Double Indemnity Benefit under Policy 10 255 251.

The policy provides that:

"The Double Indemnity Benefit shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury.

Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane; from the taking of poison or inhaling of gas, whether voluntary or otherwise; from committing an assault or felony; from war or any act incident thereto; from engaging in riot or insurrection; from participation as a passenger or otherwise in aviation or aeronautics; or directly or indirectly, from infirmity of mind or body, from illness or disease, or from any bacterial infection, other than bacterial infection occurring in consequence of accidental and external bodily injury."

It is the Company's position that it has not received the "due proof" required by the paragraph of the policy which is first quoted above. From the information received by the Company and the papers submitted by and on behalf of the beneficiary in support of her claim, it does not appear that the insured's death is within the coverage of the Double Indemnity Provision of the above policy. On the contrary, such information and papers indicate that the insured's death was caused directly or indirectly from infirmity of body or from illness or disease and did not result directly and independently of all other causes from bodily injury.

effected solely through external, violent and accidental means.

Therefore, we regret that it is necessary to advise you that the amount of the single indemnity proceeds already paid the beneficiary represents the Company's entire liability under Policy No. 10 255 251 and that the Company denies liability for the Double Indemnity Benefit.

Very truly yours,

Chairman, Committee on
Death Benefits.

HJL/h

Mr. Eberle: May it be stipulated that the proof offered in the other case just finished, that is, [3] The Business Mens Assurance Company case, by Doctor Call, Doctor Brothers and Doctor Graves, and exhibit numbered "7" in that case, and the deposition which was a part of the cross-examination of Doctor Call, and the depositions of Doctor Beeman, Doctor Swindell, Doctor Pittenger and Doctor Stewart may be copied into the record as evidence in this case.

The Court: The record may be made just the same as if the witnesses were on the stand in this case. I understand that the only exhibits we have in this case is exhibit 1, which I think is the policy and the letter exhibit 2 and the hospital chart or record and the deposition of Doctor Call.

Mr. Eberle: I understand the exhibits will be numbered 1, 2, 7 and 8.

The Court: Should there be copies for the rec-

ord in this case. Also they will be renumbered here. Doctor Call's deposition will be number 3 and the hospital record will be number 4. There being no objection they may be admitted.

PLAINTIFF'S EXHIBIT No. 3

In the District Court of the United States for the
District of Idaho—Eastern Division

Civil Action No. 1462

CECILIA J. WILSON,

Plaintiff,

vs.

BUSINESS MEN'S ASSURANCE COMPANY
OF AMERICA, a Corporation,

Defendant.

Civil Action No. 1463

CECELIA J. WILSON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation of New York,

Defendant.

The deposition of Doctor O. F. Call, of Pocatello, Idaho, was taken before me, R. D. Bistline, a Deputy Clerk of the above-entitled Court on the 17th day of February, 1948, at the office of said Doctor O. F. Call, in the Kasiska Building, Pocatello, Idaho, pursuant to stipulation of counsel for the

Plaintiff's Exhibit No. 3—(Continued)

respective parties to this action, on behalf of the respective defendants in the above-entitled actions.

B. W. Davis of Pocatello, Idaho, appeared as attorney for the plaintiff in each case, and J. L. Eberle of Boise, Idaho, appeared as attorney for the defendant Business Men's Assurance Company of America, a corporation; and A. L. Merrill, of Pocatello, Idaho, appeared as attorney for the defendant New York Life Insurance Company, a corporation of New York.

DR. O. F. CALL,

being by me first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified and deposed as follows:

Direct Examination

By Mr. Eberle:

Q. Doctor, will you state your name, please?

A. O. F. Call.

Q. And you are licensed to practice medicine in Idaho?

A. Yes, sir.

Q. And how long have you been so practicing?

A. Since 1921.

Q. Do you know the plaintiff, Cecelia J. Wilson?

A. I do.

Q. And is she the widow of Harry Wilson?

A. She is.

Q. Were you Mr. Wilson's doctor?

A. I was.

Q. Over what period of time were you his doctor, or medical attendant?

Plaintiff's Exhibit No. 3—(Continued)

A. Oh, I have been the family attendant for a period of fifteen years,—around fifteen years.

Q. Now, can you give us briefly the medical history of Mr. Wilson during those fifteen years, giving it to us chronologically?

A. Well, it goes something like this: Like all people, Mr. Wilson had the ordinary colds, grips, periodically, as most of us do, and about,—this is just a guess right now, about ten years ago, or seven years ago,—between seven and ten years ago, he had a bowel obstruction for which I operated him. I don't recall the exact year of that,—it was 1940, about eight years ago,—from which he made a recovery with the result of an incisional wound, incisional rupture, hernia,—what we call a ventral hernia, for which he was operated for repair work about four years ago in the Mayo Clinic. Now, he was also operated at that time for an inguinal hernia. And then he returned home here and I became his attendant again, treating him for occasional colds, and a mild rise in his blood pressure, which I watched, along with him, for the last four or five years. Then the last work I did for Mr. Wilson was in April, 1947, at which time I took him to the hospital to repair this recurring inguinal hernia.

Q. Let's go back to the time of the hernia operation at the Mayo Clinic, was that in 1944?

A. 1943, I have it here in my notes.

Q. In 1943. And had he come to you first before he went to Mayo's?

Plaintiff's Exhibit No. 3—(Continued)

A. Oh, yes. I advised him to go and have those people do that.

Q. Now in 1947 then, you started to say something about taking him to the hospital?

A. In 1947 he had a recurrence of the inguinal hernia and from 1943,—he came back soon after he left the Clinic, and they had a truss on him, an abdominal truss with a pad over the hernia, which he wore until the sixth of April, 1947, on which day we operated on him for repair of that inguinal hernia.

Q. When did you take him to the hospital? What day?

A. He entered on the sixth of April,—4-6-47 is correct,—and he was prepared for an operation, and on the seventh of April he was operated for a right inguinal hernia.

Q. It was on the seventh? A. Yes.

Q. Now, Doctor, you made an examination before the operation, did you? A. Oh, yes.

Q. And that was on the sixth, was it?

A. Well, yes, on the sixth.

Q. On the sixth of April, 1947?

A. That is right.

Q. At that time was he well nourished?

A. Yes; he was well nourished.

Q. Was he overweight? A. No.

Q. What was his age?

A. His age was sixty-one, as I have it recorded here.

Q. Sixty-one. And have you his weight at that time?

Plaintiff's Exhibit No. 3—(Continued)

A. I doubt very much if I have. They are usually weighed at the hospital but I don't have it in the record, his weight in the hospital.

Q. Have you got his height?

A. I haven't got it,—yes. No; I haven't either; that is his blood pressure.

Q. Do you know what his height was, Doctor?

A. About five foot eight,—about that.

Q. And do you know about what his weight was? A. About one hundred and sixty.

Q. One hundred and sixty. Now, was his blood count normal at that time, on April sixth?

A. Yes; it was. I can give it to you, if you want it.

Q. All right, read it into the record.

A. His blood count was 4,300,000 red corpuscles, and 7,500 white, with a hemoglobin content of 15.2. And I have here the urine examination of the same date.

Q. Yes; will you give us the results of the urine examination, Doctor?

A. On the urine examination he had a specific gravity of 10.20, which is normal, and amber color; acid in reaction; no albumen; no sugar; no pus cells; no blood cells and no epithelial cells; no casts; no crystals. In other words, a normal urine.

Q. And, Doctor, was his heart normal?

A. Yes; his heart was normal, with a rate of seventy-two per minute, the morning he went to surgery.

Q. Do you know whether there had been any

Plaintiff's Exhibit No. 3—(Continued)

pre-existing cardiac disease?

A. I don't have any record of any, or any note of any pre-existing cardiac disease over the period I have taken care of him. I do have a record of an occasional raise in his blood pressure. You would hardly call that a cardiac disease; that is vascular,—a vascular disease. That isn't cardiac.

Q. Was there any evidence of varicose veins?

A. I think not. Let me look at the examination and I will tell you for sure,—there was no notation of any varicose veins.

Q. Was there any swelling in his legs or feet?

A. No.

Q. And you didn't observe any varicose veins in his legs?

A. I have no record of any varicose veins.

Q. Was his blood pressure within normal limits for his age?

A. Slightly above. He was aged sixty-one, and his blood pressure was one hundred and sixty over eighty-six, which means one hundred and sixty diastolic and eighty-six systolic.

Q. And at the time,—and I am speaking now of April sixth before the operation?

A. That is what I understood.

Q. Was there, Doctor, more than the usual arteriosclerosis for a man of his age?

A. No.

Q. Did he have a cold?

A. He did not. We don't operate when they have colds.

Plaintiff's Exhibit No. 3—(Continued)

Q. Well, I am just asking you. When did he arrange with you for this operation?

A. We talked about this operation for several months. We didn't make the actual arrangements until the day before,—the exact time.

Q. And excepting as you have mentioned, his cardio-vascular system was within normal limits?

A. That is right.

Q. Now, was there any unusual incident that occurred during the operation?

A. No; it was very smooth.

Q. And skillfully performed?

A. Yes; skillfully performed, if I do say so myself.

Q. Was there any autopsy? A. No.

Q. Now, Doctor, have you the hospital records?

A. Yes; I have them right here.

Mr. Eberle: I will have this marked as Defendants' Exhibit "A."

(Whereupon document referred to was marked Defendants' Exhibit "A" by the Reporter.)

Q. (Mr. Eberle, continuing): Doctor, handing you Defendants' Exhibit "A," I will ask you if this is the hospital record of Mr. Wilson?

A. This is. That is right.

Q. It is the original record of which hospital?

A. Of the St. Anthony's Hospital, Pocatello.

Q. Of the St. Anthony's Mercy Hospital at Pocatello, Idaho? A. Yes, sir.

Plaintiff's Exhibit No. 3—(Continued)

Q. And is it a complete record,—is it the complete record of the hospital?

A. Yes; of the hospital, it is.

Mr. Eberle: Now, Mr. Davis, I would like to offer this in evidence, and in the order that the hospital may have the original record returned, may it be agreed a photostatic copy may be substituted, and marked Exhibit "A"?

Mr. Davis: That is agreeable.

Mr. Eberle: And that the copy may serve the same purpose as the original?

Mr. Davis: Yes. Now, I make no objection as to the identification, and, of course, while the right is reserved in the stipulation, I want it understood, Mr. Eberle, that I am reserving the right here to object to that as to its materiality or its competency, if in examining it it appears that it isn't competent or material. I haven't examined it. Doctor Call just brought it over so it could be available here.

Q. (Mr. Eberle, continuing): Have you any office records, Doctor?

A. Not of this. I have office records over the past years.

Q. Now, Doctor, can you tell us at what hour on April sixth Mr. Wilson went into the hospital?

A. Into the hospital at seven ten p.m.

Q. On April sixth?

A. On April sixth.

Q. And when did you operate on April seventh?

A. I operated on April seventh,—the hour isn't

Plaintiff's Exhibit No. 3—(Continued)

given, but it would be at eight or nine o'clock in the morning.

Q. At either eight or nine o'clock on the morning of the seventh? A. Yes, sir.

Q. And at what time did death occur?

A. Death occurred at five o'clock in the morning of April eighth.

Q. At five o'clock a.m. on April the eighth. Have you those records of previous attendance on Mr. Wilson, Doctor Call? A. Yes; I have.

Q. I wonder if we could see them?

A. Is it important you have the hour he was operated?

Mr. Merrill: Yes; if you have it.

Q. (Mr. Eberle, continuing): You said it was around eight or nine o'clock in the morning, didn't you, Doctor?

A. It would be either eight or nine, and I can't see here where the hour of the operation was given. The hour isn't given. As a rule it is there, but it is not there.

Q. That is your best recollection?

A. I know it was at either eight o'clock or nine o'clock. That is one thing I do know. It is one thing I know is true. I know, for the reason that surgery is always done at one of those two hours, whenever possible.

Q. Doctor, going back to the operation that you performed on Mr. Wilson, for the intestinal obstruction, was it?

A. Yes; for an intestinal obstruction.

Plaintiff's Exhibit No. 3—(Continued)

Q. In 1940?

A. He developed an infection in his wound, and that was followed by a hernia of the wound.

Q. Of the wound, you say,—you mean the incision in connection with the intestinal obstruction operation?

A. Yes.

Q. The wound of this operation would not heal; is that correct?

A. It healed, but it left a hernia. There are five layers in the abdominal wound. Four of them gave way and left the skin over it, and that is what you call the hernia.

Q. Did you operate on that what you call a “ventral” hernia?

A. No; that is the one he went to Mayo's for.

Q. He went to Mayo's for that operation?

A. Yes, sir.

Q. And he was also operated on at Mayo's for the inguinal hernia?

A. Yes.

Q. And then he came back to Idaho, and in 1947 you operated on him for the inguinal hernia at that time?

A. That is right.

Mr. Eberle: I think that is all I have. Have you any questions, Mr. Davis?

Mr. Davis: No; I don't care to ask him any questions.

Mr. Eberle: I think that is all then, Doctor.

(Reporter's Note: Signing of the deposition by deponent was waived by stipulation of counsel hereto annexed. R.D.B.)

Plaintiff's Exhibit No. 3—(Continued)

CERTIFICATE OF OFFICER

United States of America,

State of Idaho, County of Bannock—ss.

I, R. D. Bistline, the duly appointed, qualified and acting Deputy Clerk of the District Court of the United States, for the District of Idaho, Do Hereby Certify That Doctor O. F. Call was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth, and that the above and foregoing deposition by him was recorded stenographically by me and later by me reduced to long-hand typewriting;

I Further Certify That the signing of said deposition by the witness was waived by stipulation of respective counsel, which stipulation is hereto annexed; and that said deposition constitutes a true record of the testimony given by said witness.

I Further Certify That the said deposition was taken by me at the time and place hereinbefore specified and that the taking of said deposition commenced on the 17th day of February, 1948, at the hour of one-thirty o'clock p.m., and was completed the same day.

I Further Certify That B. W. Davis, of Pocatello, Idaho, appeared as attorney for the plaintiff, and J. L. Eberle of Boise, Idaho, appeared for the defendant Business Men's Assurance Company of America, a corporation, and that A. L. Merrill, of Pocatello, Idaho, appeared as attorney for the defendant New York Life Insurance,

Plaintiff's Exhibit No. 3—(Continued)

Company, a corporation of New York, and that each of said attorneys was present during the entire examination.

I Further Certify That I am not an attorney or counsel of either of the parties to this action, or a relative or employee of any attorney or counsel connected with the actions, and am not financially interested in the action.

In Witness Whereof, I have set my hand, and affixed the seal of said United States District Court for Idaho this 21st day of February, A.D. 1948.

[Seal]

ED. M. BRYAN,
Clerk, U. S. District Court.

By
Deputy.

DR. O. F. CALL,

being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis: [4]

Q. Doctor, will you state your name?

A. O. F. Call.

Q. Where do you reside?

A. Pocatello, Idaho.

Q. What profession do you follow?

A. Physician and surgeon.

Q. What college or school did you attend?

A. Jefferson Medical College, Philadelphia.

Q. Are you a member of any medical society?

(Testimony of Dr. O. F. Call.)

A. Yes, sir.

The Court: I wonder if counsel can't admit this man's qualifications. I know I will take judicial notice of his qualifications.

Mr. Davis: I did think to show the amount of practice.

The Court: Certainly you may do so.

Mr. Davis: No, when the Court makes a suggestion I will not go against that.

Q. I will simply ask how long you have practiced, Doctor? A. Since 1920.

Q. Have you done any post graduate work?

A. Yes, sir.

Q. When?

A. In 1926 one winter in New York studying surgery, and an entire year in 1930 in the University of Pennsylvania post-graduate surgery. [5]

Q. You have attended in the past, or gone to Mayo's clinic to study their technique?

A. Yes, frequently, about every other year.

Q. Doctor, you knew Mr. Wilson; Harry Wilson, deceased? A. Yes, sir.

Q. How long had you known him?

A. About twenty years.

Q. You had been his physician?

A. Yes, sir.

Q. How long had you been his physician?

A. All of that time.

Q. Doctor, prior to this operation you performed what was Mr. Wilson's general condition?

A. He had ordinary good health of the average.

(Testimony of Dr. O. F. Call.)

man with the exception that he had had an operation about four years ago at the Mayo Clinic, that is, four years before this last operation. He had ordinary colds the same as the average man and a little difficulty with hypertension—high blood pressure.

Q. What was this operation on April 7 for?

A. Recurrent inguinal hernia.

Q. What was his general condition when he went into the hospital? A. Very good.

Q. That is before this last operation?

A. Yes, it was very good. [6]

Q. When was this operation performed?

A. April 7, I think it was eight in the morning.

Q. A regular chart was kept, a regular hospital chart written by the nurse was kept in this case?

A. That is right.

Q. Is it ordinary and customary for a nurse to report on the chart the fact that the patient snores?

A. Not ordinary.

Q. Is there a report on the chart here of continuous and loud and violent snoring by this patient?

A. Yes, sir, there is, the nurse made several reports of loud continuous snoring, more than she had heard in other cases and she was assured—

Q. What was that, Doctor?

A. She was assured that was a common thing with Mr. Wilson, that he always snored.

Q. What was the nature of Mr. Wilson's snoring in the hospital prior to his passing?

(Testimony of Dr. O. F. Call.)

Mr. Merrill: Are you referring now to his personal knowledge?

Q. Personal knowledge, Doctor, do you have personal knowledge of it?

A. Yes, I was there and heard him snoring.

Q. Was it violent and almost a spasm would you say?

A. Sometimes you would think that he would shut off his breath and then he would catch his breath with a jerk. [7]

Q. And would the patient jerk or move?

A. Yes, sir, he would rather jerk.

Q. Did he have an accumulation of phlegm or coughing spells?

A. No, I wouldn't say,—well, after snoring he would have a slight cough like that (indicating)

Q. Do you have the chart with you, Doctor?

A. I think it is in the Court room.

Mr. Davis: We offer in evidence exhibit marked exhibit "7," the original chart from the hospital and counsel for the defendant has taken photographic copies of this instrument and we would like to have it understood that a photographic copy may be used if the matter should remain in Court any considerable time so that the original could be returned.

The Court: It may be introduced subject to withdrawal.

Q. Now, Doctor, I call your attention to the—

The Court: —You understand that the photo

(Testimony of Dr. O. F. Call.)

static copy may be used in lieu of this original after the trial of this case.

Mr. Davis: Yes, that was my understanding. This is plaintiff's exhibit "7."

Q. I call your attention to the nurse's bedside chart or bedside notes, and to the fact that it refers twice to [8] the fact that he was coughing, and that something was given for the cough. If the record shows that, it would indicate that he was coughing. A. Certainly.

Q. How many operations for hernia have you performed during your practice?

A. I have been doing them for twenty odd years, I would say four or five hundred.

Q. Out of that four or five hundred how many post-operative deaths have occurred in your operations for hernia?

A. This one case only.

Q. Did you give this case the same general care and attention that you gave the others?

A. Yes, sir.

Q. The same attention you gave all of them?

A. Yes, sir.

Q. Doctor Call, can you or would you say that post-operative death from hernia is a very rare occurrence? A. Yes, it is.

Q. What do you base that statement upon?

A. I base that upon my own experience that I have mentioned and the various clinics around the country; the statistics that we have gathered.

Q. In the case of Mr. Wilson was there anything

(Testimony of Dr. O. F. Call.)

that could have been reasonably anticipated, or was there any reason [9] for you to expect a post-operative death? A. No.

Q. Or death by pulmonary embolism?

A. No reason that I could expect in relation to the operation.

Q. If there had been any reason for you to expect that would you have operated?

A. No.

Q. Generally in the medical profession and following the usual standards, if there is anything to indicate, or the percentage of cases show that there is a likelihood of death or that you could anticipate death would you operate?

A. I don't think that there is a surgeon in the country that would operate if he thought the man was going to die.

Q. What was the cause, in your opinion, of Mr. Wilson's death?

A. Acute pulmonary embolism.

Q. What is pulmonary embolism?

A. An embolism is a foreign substance or piece of a clot flowing in the blood stream which goes through the heart; through the pulmonary artery to such a place that it can't go any farther and lodges in the pulmonary artery or branch of it. It can be a clot of blood, a fatty or foreign substance.

Q. It doesn't follow that it is a clot of blood?

A. Not necessarily. [10]

Q. Was this pulmonary embolism caused by and a result of the hernia operation?

(Testimony of Dr. O. F. Call.)

A. I don't think it would be anything per se connected with the operation.

Q. I call your attention to the deposition of Doctor Beeman,—have you read the deposition of Doctor Beeman, Doctor Swindell, Doctor Pittenger and Doctor Stewart?

A. Yes, sir.

Q. Which were taken in this case?

A. Yes, sir.

Q. Now, I call your attention to the following answer by Doctor Beeman on page eight of the deposition where he was being questioned about this case and why there would be a pulmonary embolism and death, wherein he said: "For the reason that an operation for intestinal obstruction and repair of the hernia could easily have caused a venous thrombus at that time." Now, Doctor, that was referring to a prior operation?

A. Yes, sir.

Q. Continuing, "and the hernia operation of April 7, 1947, may have been the exciting factor in causing this venous thrombus to break down and for a pulmonary embolism." Assuming that Doctor Beeman was correct in that premise and that a thrombus had been formed, it would not necessarily follow that even if there was a thrombus that it caused [11] this particular embolism?

Mr. Merrill: Objected to as leading.

The Court: He may answer.

A. That is not just clear to me, your question.

Q. Yes,—now assuming that Doctor Beeman is correct and that a thrombus may have occurred or formed previously and that it may have been the

(Testimony of Dr. O. F. Call.)

exciting factor, as he says, in the pulmonary embolism, now, there may be other things that would have been the exciting factor too?

A. Yes, sir.

Q. The violent snoring that the man did, and the choking and the violent coughing may have been the exciting factor?

A. Yes, sir.

Q. And could have been.

A. Yes, sir.

Q. And in your opinion, Doctor, was that the cause?

Mr. Merrill: Objected to as leading.

The Court: It is somewhat leading, he may answer however. It is a matter the Court has control of.

A. That is my opinion.

Q. Now, Doctor, I call your attention, have you looked at and studied and been given the definition of accident as defined in Webster's International Dictionary?

A. Yes, sir. [12]

Q. In your opinion was the death of Mr. Wilson due to accident?

A. Yes, sir.

Q. Are you familiar with and have you studied and read this book written by TeLinde,—Richard W. TeLinde?

A. Yes, sir.

Q. This was published in 1947.

A. Yes, sir.

Q. Now, Doctor, I call your attention to a statement in there on page 87 in which he says: "Pulmonary embolism is one of the most dramatic and tragic accidents that occur in surgery." You have read that?

A. Yes, sir.

Q. Do you agree with that?

A. I do.

Q. And I call your attention to another statement

(Testimony of Dr. O. F. Call.)

on the same page where he is also discussing pulmonary embolism and where he says that occasionally there is something else causing the plugging of the pulmonary circulation which causes death, such as bronchial obstruction and so on,—do you agree with that? A. That is a well-recognized fact.

Q. Coughing and violent snoring might cause the breaking loose of a clot or foreign substance that caused the pulmonary embolism.

A. Yes, sir. [13]

Q. And is it your opinion in this case that is what did cause it? A. Yes, sir, that is right.

Q. I call your attention to the deposition of Doctor Beeman and that reference is made to the fact that pulmonary embolism may come from immobilization. If as stated by Doctor Beeman there had been a thrombus,—if this man had a thrombus,—Doctor, what is the treatment for Thrombus?

A. Rest and quiet.

Q. Mobilization would be absolutely the wrong treatment. A. Yes, sir.

Q. That is, if the man had a thrombus?

A. Yes, sir.

Q. Was this man treated the same as other patients following a hernia operation?

A. Yes, sir, the standard form of treatment?

Q. I call your attention to a question asked of Doctor Swindell on page 13 of the deposition the question is: “Is there any substantial difference in the symptomatology of a pulmonary embolism and a

(Testimony of Dr. O. F. Call.)

thrombus." And the answer is: "No." What is your answer to that, Doctor?

A. A decided difference.

Q. What is the difference between a Thrombus and embolism?

A. A thrombus is a large, or any clot filling a vessel, and an embolism is a little particle of that clot floating. [14] The symptoms of the thrombus would be swelling of the part involved, and interference with the circulation,—a pain in that area, and the symptoms of pulmonary embolism is an acute tragic pain in the chest.

Mr. Eberle: If you are going to continue with this form of examination I will have to object, it is not proper to compare the testimony of one witness with that of another. It is not proper to ask this witness if he agrees with the testimony of another witness.

The Court: The question has been answered, there is nothing before the Court now.

Q. Doctor Call, I am referring now to page 15, in the testimony of Doctor Swindell: "Would the same be true of immobilization as incident to surgical procedure"? The answer: "Yes, immobilization predisposes to the formation of thrombi and emboli." Now, Doctor, does immobilization predispose to the formation of Thrombi?

A. Yes, sir.

Q. What is the difference between thrombus and thrombi?

A. Thrombi is the plural of thrombus.

(Testimony of Dr. O. F. Call.)

Q. I thought immobilization was the treatment for thrombosis?

A. That is right, I misunderstood you, I thought you were talking about embolism.

Q. Now, here is the question, Doctor. "Would the same be true of immobilization as incident to surgical procedure?" [15] And the answer: "Yes, immobilization predisposes to the formation of thrombi and emboli." Does immobilization predispose to the formation of Thrombi? A. No.

Q. Was there any indication that Mr. Wilson was suffering—strike that please,—At the time of Mr. Wilson's death is there any indication that there was a condition of profound shock?

A. No, sir.

Q. Why do you say that?

A. Because of the symptoms present. Profound shock means rapid pulse, rapid feeble pulse, weak heart beat; a person in a general exhausted condition.

Q. Referring to exhibit 7, Doctor, which is the hospital record and the chart, do you recall what the man's pulse was at the time of passing away?

A. About seventy-two, it never went above eighty.

Q. Did it ever go above 72, had it ever gone above seventy-two according to that?

A. I think there is one place recorded that it was between 72 and 80.

Q. There isn't anything to indicate that the person was suffering from shock at all.

A. There is not.

(Testimony of Dr. O. F. Call.)

Q. Have you, in addition to your general knowledge, within [16] the last forty-eight hours, made a study to refresh your memory and to keep you advised, or to fully advise you as to the percentage of post operative deaths from pulmonary embolism in all kinds of abdominal surgery, not hernia but all abdominal surgery? A. Yes, I have.

Q. What does the book of TeLinde, which I have referred to here, show the percentage of all operations to be at Mayo's Clinic?

A. Eight per cent I think it is?

A. No, it is five and eight-tenths per cent.

Mr. Merrill: I object to counsel testifying here.

Mr. Davis: May I show the book to the Doctor?

The Court: Yes, you may.

A. That is correct, five and eight-tenths per cent.

Q. Is the hernia operation such as you performed an abdominal or pelvic operation?

A. It is not.

Q. What is an abdominal operation?

A. You open the abdominal cavity.

Q. And what is a pelvic operation?

A. Where you open the pelvic cavity.

Q. What are the kinds of operation in which there is most danger of post-operative deaths and most pulmonary embolism?

A. It is most common in female pelvic operation and in male prostate operations, and in operation in reference to the Billeni's system,—of fractures.

Q. What about the operations in reference to hernia? A. Scarcely mentioned.

(Testimony of Dr. O. F. Call.)

Q. It is very rare, is that right?

A. It is very rare.

Q. Doctor Call, taking your own experience, in all operations you have performed over the period of years you have practiced would it exceed a thousand?

A. Yes, it is more than that, I would say several thousand.

Q. How many post operative deaths from pulmonary embolism in all of those operations have you had?

A. I can off-hand think of three.

Q. Including this one? A. Yes, sir.

Q. You have been and are Mrs. Wilson's physician? A. Yes, sir.

Q. What was Mrs. Wilson's general condition in June and say up to the 15th of July of this year?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: It may be admitted, he may answer, this is subject to your objection. If on going into this matter the Court decides it is not material, then it will be stricken. I think you said July of this year.

Mr. Davis: Of course, I meant July of last year.

A. Her health was very poor. [18]

Q. Was it possible for you as her Doctor or myself as her counsel, during the fore part of July or the last part of June to talk to her about matters in connection with her husband's death, or to transact any business with her in reference to her estate?

A. Such procedure would be very harmful to Mrs. Wilson.

(Testimony of Dr. O. F. Call.)

Q. And it was your opinion that it should not be done?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer subject to your objection.

A. That is right.

Q. And that she should be left alone?

Mr. Merrill: The same objection.

The Court: The same ruling.

A. That's right.

Q. What are the cardinal symptoms of pulmonary occlusion?

A. Occlusion means stopping.

Q. Would it be accompanied by pain?

A. Yes, it would be accompanied by quite severe pain.

Q. There is nothing to indicate that this man had coronary thrombosis or pulmonary occlusion.

Mr. Merrill: Objected to as leading.

The Court: It is leading but he may answer. [19]

Mr. Davis: I will withdraw the question, it is not of any particular help. I think that is all, you may cross-examine.

Cross-Examination

By Mr. Eberle:

Q. Did you give your deposition in this matter some time ago? A. Yes, sir.

Mr. Eberle: May I have the deposition published?

The Court: It may be published. I think before

(Testimony of Dr. O. F. Call.)

you start this examination we will take a ten-minute recess.

11:05 a.m., March 17, 1948

Mr. Davis: I would like to clear up one matter if I may before they take the witness.

The Court: Very well.

Q. Doctor Call, in asking my questions I asked you to give the cardinal symptoms of pulmonary occlusion, I used the word pulmonary instead of coronary. I meant coronary occlusion?

A. The symptoms are; intense agonizing pain, probably the most intense known to the human body; profound sweating, and one can hardly get his breath.

Q. Doctor, going back to post-operative death. What is your opinion from your own experience and based upon the study you have made of the authorities. Where death is due [20] to surgery,—due to pulmonary embolism and where pulmonary embolism is due to surgery, does that follow immediately or within twenty hours or is it more likely to follow later?

A. It is more likely to follow from thirteen to twenty-one days later.

Q. Thirteen to twenty-one days later?

A. That's right.

Mr. Davis: That is all, you may examine.

Cross-Examination

By Mr. Eberle:

Q. Doctor Call, handing you exhibit 8 I will ask you if that is the deposition you gave recently in this

(Testimony of Dr. O. F. Call.)

case, and is exhibit "A" attached thereto a part of it?

A. Yes, sir, it is, that is correct.

Mr. Eberle: I offer it in evidence as a part of the cross-examination of this witness.

Mr. Davis: No objection.

The Court: It may be admitted.

Q. Exhibit "A" and exhibit "8" Doctor Call, exhibit "A" is that a photostatic copy of the hospital record?

Mr. Davis: Unless the Doctor knows I will object. If he may have an opportunity to check it with the original.

The Court: Yes, certainly, when it is checked [21] it may be substituted if that is your desire.

Q. When did you last see Mr. Wilson?

A. You mean at the hospital.

Q. When did you last see Mr. Wilson on April 8?

A. I saw him just a few minutes after his death, that is the last I saw him.

Q. Someone there at the hospital called you?

A. Yes, sir.

Q. About what time in the morning of April 8 did they call you, from the hospital?

A. About 4:30.

Q. In the morning. A. Yes, sir.

Q. Mr. Wilson had died before you arrived?

A. I immediately dressed and went over, as I got there he was expiring.

Q. It took you about a half hour to get there?

A. I was in bed when they called.

(Testimony of Dr. O. F. Call.)

Q. Prior to that when was the last time you had seen Mr. Wilson?

A. Eleven o'clock in the evening.

Q. The evening of the seventh?

A. Yes, sir.

Q. And is your diagnosis of his death as a result of pulmonary embolism based upon the hospital record? [22]

A. Based upon personal analysis of the case.

Q. At eleven o'clock when you last saw him did he show any indication of the terminal period?

A. No, sir.

Q. At eleven o'clock when you saw him there was no symptomology of acute heart failure?

A. That's right.

Q. When you saw him in the morning he was just about expired?

A. Yes, sir.

Q. And on that,—that is what you based your diagnosis on?

A. It would have to be on that and on the record.

Q. Is it difficult to diagnose death of pulmonary embolism as distinguished from acute heart failure?

A. I don't think so. I might say this: If you want to be absolutely certain,—if you want absolute proof you would have to have a post mortem.

Q. You cannot be absolutely sure without a post mortem.

A. You have the record and all these circumstances,——

Q. ——But Doctor, when you arrived at the time

(Testimony of Dr. O. F. Call.)

of death, when you arrived at the hospital what did you find to base your diagnosis on?

A. The record of the nurse.

Q. What else?

A. He was expiring suddenly.

Q. Those two things are the only basis for your diagnosis. [23]

A. That's right.

Q. How many times did you see Mr. Wilson between the time of the operation at eight or nine in the morning of the 7th and eleven o'clock that night?

A. I cannot tell you the exact number of times, I was in and out of the room several times.

Q. You operated between eight and nine?

A. Yes, sir.

Q. And you went in again shortly after the operation?

A. Shortly after nine I would say.

Q. He was under the anesthetic?

A. He had a spinal and he was not asleep.

Q. When did you see him again?

A. In ten or fifteen minutes, I was there all morning taking care of hospital work. I saw him several times.

Q. Several times before noon would you say?

A. Yes.

Q. In the afternoon when did you see him?

A. About four-thirty.

Q. When did you see him again?

A. I dropped in again around nine o'clock.

Q. About nine and then again about eleven that evening.

A. That's right.

(Testimony of Dr. O. F. Call.)

Q. In your opinion repair of this hernia was necessary?

A. It was very advisable. The man could live without it but it was very advisable. [24]

Q. You wouldn't operate unless it was necessary?

A. To the reconstruction of good health it was necessary.

Q. The surgery you performed was in the method usually followed by skilled surgeons?

A. That's right.

Q. Now then, Doctor, before you left at noon was there any snoring?

A. As he would drop off to sleep under the opiate.

Q. Under the opiate? A. Yes.

Q. He was snoring?

A. Of course, at times he was not asleep.

Q. If he was asleep he was snoring?

A. Yes, sir.

Q. How often was he snoring?

A. I didn't keep track of that. I know I would talk to him and he would joke with me but when he went to sleep he would be snoring.

Q. At nine o'clock he was snoring.

A. At nine o'clock he was joking about a bridge game part of the time.

Q. At eleven o'clock he was snoring.

A. Part of the time, yes.

Q. When did he start to cough?

A. During the night. [25]

Q. Was he coughing at nine o'clock?

A. Between nine and eleven.

(Testimony of Dr. O. F. Call.)

Q. You saw him about nine and again about eleven.

A. Yes.

Q. You wouldn't know except by the hospital record that he was coughing between nine and eleven.

A. That is the only way I would know, I wasn't there to hear it.

Q. I think you said that embolism was not the result of the operation?

A. I don't think it had anything to do with the operation per se.

Q. What do you mean "per se"?

A. Per se is a direct connection. It would mean that the operation would have no direct connection, not the direct cause of death. It means, in and of itself.

Q. In other words, it may have been the cause, but not in and of itself.

A. Not in and of itself.

Q. It may have been the cause.

A. It could have been the exciting cause.

Q. It could have contributed to the embolism.

A. Yes.

Q. If this would have happened without the operation it is your opinion that Mr. Wilson would have died,—without [26] the operation?

A. He might have been going down the street; he might have been coughing or snoring, he might have fallen.

Q. And of course, he would have died.

A. Yes, sir, he could have.

Q. And he might have died at home, in bed.

(Testimony of Dr. O. F. Call.)

A. Absolutely.

Q. If the embolism was not caused by the operation, what in your opinion was it caused by?

A. Extreme coughing and snoring is enough to break loose a part of a thrombus and make the embolism.

Q. Was the coughing and snoring incident to the operation?

A. Partly connected with the operation. The sedative made him snore more than he would at other times.

Q. What pre-operative medication did you give?

A. I gave opiates and barbitrates.

Q. That would wear off in how long?

A. In about six hours.

Q. What did you give after that?

A. Opiates.

Q. Is that usual in operations of this type?

A. Yes, sir.

Q. And the opiates putting him to sleep made him snore.

A. Yes, sir.

Q. Did you know that he snored? [27]

A. Yes, I did.

Q. You knew that was a hazard?

A. I knew that he always snored when he slept.

Q. Doctor, what did that cough come from?

A. As he snored a little phlegm would get in his throat, it would collect and drop in his throat, causing him to cough.

Q. Coughing as you suggested could have caused the embolism, could a heart condition——

(Testimony of Dr. O. F. Call.)

A. He didn't have a heart condition.

Q. Atelectasis of the lungs?

A. He didn't have atelectasis.

Q. Could it have come from immobilization?

A. Hardly.

Q. What could it have come from?

A. From the phlegm that came during his sleep and caused the coughing.

Q. What other possible causes?

A. The possible causes are numerous, he could have had metastatic congestion.

Q. Post operative congestion? A. Yes.

Q. If that was the case, it would be due to the operation?

A. Yes, if he had that it would; I don't say he did have.

Q. What else could it have been? [28]

A. The man could have had a cough, a cold.

Q. Ether pneumonia.

A. But he didn't have ether. You were asking for the possibilities.

Q. Do you think, Doctor, that the snoring was sufficient to cause a breaking of a thrombus?

A. His snoring was so severe, well, he would hold his breath and then he would jerk when he would take in his breath he would draw this phlegm into his throat.

Q. Doctor, where would this break loose,—this thrombus?

A. Wherever the embolism was formed.

Q. Where was this embolism?

(Testimony of Dr. O. F. Call.)

A. In the veins of the pelvis, was likely leading from the pelvis circultaion.

Q. How was the clot formed?

A. Due to a former operation where he had a bowel obstruction. He had this thrombus, it happens in lots of people.

Q. You think it could have broken loose after four years? A. It is entirely possible.

Q. Was it possible to arise in the calf of his leg?

A. He didn't have anything in the calf.

Q. Where do they arise generally?

A. In a branch of the Illiac veins.

Q. Counsel questioned you quite a little about immobilization, do I understand you are of the opinion that immobilization [29] cannot or could not cause pulmonary embolism?

A. Immobilization does not cause embolism. Mobilization causes embolism.

Q. Why do people have phlebitis?

A. That is not embolism.

Q. What was that, Doctor?

A. That is not embolism, you are thinking of thrombosis of the vein.

Q. The difference between thrombosis and embolism is one stays in the vein and the other floats?

A. A small portion breaks loose.

Q. Then you call it an embolus.

A. Yes, that's right.

Q. Embolism arises from any kind of immobilization, or mobilization, you say, Doctor?

A. Where there is a predisposing cause.

(Testimony of Dr. O. F. Call.)

Q. Does immobilization cause stagnation of the blood in the veins? A. It does.

Q. And stagnation predisposes embolism.

A. Predisposes thrombosis.

Q. And then it breaks off because of some acute action? A. That is mobilization.

Q. Acute or undue action?

A. Yes, sir. [30]

Q. Do Thrombosis or thrombus come in due course of treatment without surgery?

A. Yes, sir, Typhoid produces thrombosis, varicose veins, injury external violence all produce thrombosis.

Q. Do I understand that you have had only three post-surgical deaths in your practice?

A. If you do you are wrong. I said three pulmonary embolism deaths.

Q. How many post-surgical deaths?

A. I cannot answer that at this time but three pulmonary embolism post-surgical deaths.

Q. When you commence surgical procedure you are fully aware that you can expect pulmonary embolism?

A. We know it is possible but we don't expect it.

Q. It is foreseeable in any case.

A. It is not foreseeable. If it was we would not be operating like we do.

Q. Do you have to take safeguards?

A. Yes, sir.

Q. Then if it is not, and was not foreseeable why do you take safeguards?

(Testimony of Dr. O. F. Call.)

A. It is a possibility but it is not foreseeable.

Q. It is foreseeable in the sense that it might happen.

A. It is a possibility but it is not foreseeable.

Q. Perhaps we are playing on words, Doctor. When you start [31] surgery it is something that might happen in every case?

A. You think of it. It might happen.

Q. Isn't it a fact that the majority of surgical cases,—strike that,—isn't it a fact, Doctor, that the majority of surgical deaths are due to embolism?

A. No, sir.

Q. Have you ever read Cecil on Medicine?

A. Yes, sir.

Q. Is it a standard work? A. Yes, sir.

Q. Is it a standard work? A. Yes, sir, it is.

Q. If he said the majority of post-operative deaths are due to pulmonary embolism in hernia cases, would you agree with that?

A. It would be one man's opinion.

Q. Is the Journal of The American Medical Association a reputable publication?

A. Yes, sir, it is.

Q. Do you know Doctor Barnes of the Mayo Clinic? A. I know of him indirectly.

Q. Would you say this was a correct statement in an article in the Journal of the American Medical Association by Doctor Barnes: "If such a percentage of deaths from pulmonary embolism is applicable to the general population [32] and the ratio remains the same in succeeding years, it may be assumed that

(Testimony of Dr. O. F. Call.)

three million sixty-eight thousand people now living in this country will die eventually of pulmonary embolism."

A. That does not refer to surgical pulmonary embolism.

Q. Pulmonary embolism of all kinds.

A. Yes.

Q. Now, Doctor, pulmonary embolism can come from immobilization.

A. Pulmonary embolism can come from having a baby, from typhoid, from scarlet fever and many other causes.

Q. Would you call a person dying from pulmonary embolism at childbirth an accidental death?

A. I don't know whether I would or not.

Q. It is reasonably foreseeable in every childbirth?

A. It is not foreseeable, it might be thought of.

Q. You take it rather lightly in case of childbirth?

A. You might think about it. You can't say that it is foreseeable. It must be so you can see it in order to say it is foreseeable.

Q. Well, it is something you can anticipate?

A. It is something you can think of.

Q. It is a hazard in operations,—it is a risk.

A. Yes, it is a risk.

Q. That is true in hernia operations?

A. That is true in any operation. [33]

Q. Isn't it true that the rate of death from pulmonary embolism is five times as high from inqunal

(Testimony of Dr. O. F. Call.)

or femoral hernia operations than it was from acute appendicitis operations, excluding peritonitis or cases with ruptured appendix?

Mr. Davis: Objected to as immaterial.

The Court: He may answer.

A. My opinion on that would be based upon statistics taken from other men against this man's statistics.

Q. You would have no personal knowledge on that? A. No.

Q. Isn't it a fact that the reason—if it is a fact, Doctor, that there are five times as many post-operative deaths following hernia operations than following appendix operations, is due to the fact that hernia occurs later in life, and repairs to hernia are made later in life than appendectomies?

A. That is not my opinion that it is always the case.

Q. Do you think, Doctor, a man sixty-one is more predisposed to embolism than a much younger man?

A. Sure, that is true.

Q. Mr. Wilson was more predisposed than a younger man, now Doctor, getting to the question of accident, let me ask you this, take the case of post-operative pneumonia, is that an accident?

A. You mentioned before, ether pneumonia, there is that and [34] the person who has respiratory trouble.

Q. With that person it would not be post-operative. A. No, sir.

(Testimony of Dr. O. F. Call.)

Q. In case of death due to post-operative shock, would you call that accidental?

A. No, I don't think so, that was due to a physical condition.

Q. Doctor, do you think in this case that this man had thrombosis? A. I think so.

Q. That was a pre-existing condition?

A. I think so.

Q. Therefore it wasn't an accident.

A. It was accidental.

Q. But the pre-existing condition in the pneumonia and shock case was not accidental.

A. They are not comparable, no, they are not comparable to embolism.

Q. It was a pre-existing condition and surgery caused his death in the one case; here you say there is a pre-existing condition which caused his death because of embolism?

A. One is pneumonia from an existing condition, a respiratory condition and then there would be the other condition that also existed——

Q. ——Just a moment, Doctor, let's take the other case, where the shock was not observed, would that be an accident?

A. That is not always an accident. [35]

Q. Post-operative shock.

A. Post-operative shock, that is a condition due to the fact that the patient's condition was such that he couldn't stand surgery.

Q. Is that accidental?

A. That is incident to the operation.

(Testimony of Dr. O. F. Call.)

Q. In all cases of surgery these various things being rare, are nothing but natural consequences in a certain number of cases.

A. You may say they are things to be expected in a certain number of cases.

Q. They follow in a certain number of cases as a natural consequence.

A. They are not natural.

Q. When you operated for the repair of the hernia;—strike that,—when you operate for the repair of any hernia and there is a pre-existing condition in the venous system that results in death, are those things a natural chain of events, when you start to repair that hernia, due to the condition existing when you start your operative procedure?

A. Referring now to the case of the embolism.

Q. I am taking that assumption.

A. Then in that case the pulmonary embolism would be from violent exercise or exertion coming from something after the operation.

Q. Which would be incident to the operation. [36]

A. Following the operation.

Q. And incident to the operation?

A. Well, like a man being killed in a car accident, it is incident to riding in the car.

Q. Those things you recited followed through to the death.

A. That is right.

Q. If you hadn't started to repair the hernia would the man have died?

A. The man could have been walking down the street and be seized with a coughing spell and with

(Testimony of Dr. O. F. Call.)

the coughing and expectoration have died of an embolism.

Q. In this case if you immobilized him without surgery and had not started to repair this hernia would he have died?

A. Immobilization does not produce embolism.

Q. Then it was your repairing of the hernia which, through a chain of events all resulted in his death?

A. It is incident to it.

Q. Are you of the opinion that the condition of the venous system is a disease entity?

A. It may be a disease entity or not.

Q. The condition of the venous system is a co-existing condition with surgery, depending on that condition you have certain natural results, is that so Doctor?

A. If you have a diseased venous system you can expect untoward results. [37]

Q. Any condition of this system which affects a person following surgery, is a co-incident condition following surgery, is that not true?

A. That is right.

Q. Are you of the opinion that there are potential blood clotters as well as bleeders?

A. Yes.

Q. What test did you make for the clotting index?

A. The clotting time and bleeding time.

Q. Will you show that on the hospital chart?

A. I am not sure it is there, it is done in the laboratory and I am not sure whether it is here or not. It is not always done. There is a laboratory report

(Testimony of Dr. O. F. Call.)

here and it shows the RBC or red blood count 4,300,-000 WBC, white blood count 7500 HB 15.2 that is hemoglobin, there is other information on this chart but it does not show clotting time. All the information shows a normal condition. It does not, however, show any report of clotting time.

Q. So that there might have been a condition in the venous system or the clotting potential that may have contributed to this embolism?

A. We can prove here that he had a normal blood count, a normal hemoglobin and we don't expect a departure in clotting.

Q. But that is not always true?

A. That's right. [38]

Q. The blood chemistry might have been such that he was a potential clotter.

A. We have no proof either way.

Q. If that was the case it would be a condition that existed?

A. Assuming that he was a potential clotter.

Q. There was no test that we know of to show that he was or not.

A. No test was made.

Q. Is the cough such as mentioned a symptom, or symptomatic of a heart involvement?

A. Not necessarily.

Q. Is it a symptom of heart disease.

A. One of the symptoms.

Q. I may be mistaken, Doctor, but did you make the statement that in surgical procedure there was never any reason to expect embolism?

A. I didn't make that statement.

(Testimony of Dr. O. F. Call.)

Q. It is still the greatest scourge to surgery.

A. One of the greatest.

Q. Since penicillin and these other drugs, it is still the greatest scourge.

A. I think it is.

Q. It always stares you in the face.

A. You are trying to make me say that you expect it, that is not right. [39]

Q. You can anticipate it.

A. No, you cannot anticipate it.

Q. Why are measures taken to avoid embolism?

A. Because of the possibility.

Q. You say "possibility" instead of expectation.

A. No—it is a possibility.

Q. It is a hazard—it is present.

A. It is a possibility.

Q. What measures did you take to avoid it, Doctor?

A. What did I take?

Q. Well, what measures do you take?

A. Have the patient moved around.

Q. Pre-operative measures.

A. We look for things that might cause infection that is one thing—from these examinations we look for anything that may cause an infection and some use anti-clotting substances, Heparin and so forth.

Q. They protect against it by anti-clotting substances and thus reduce the clotting possibilities?

A. It is a new thing, done in some clinics.

Q. You didn't do it?

A. I did not. Ninety per cent do not. It is no without danger.

(Testimony of Dr. O. F. Call.)

Q. Doctor, is this a correct statement of the distinction in the diagnosis between pulmonary embolism and acute heart [40] failure: At the outset of pulmonary embolism—rather at the onset of pulmonary embolism there is a pallor which is succeeded by cyanosis, while in acute heart failure cyanosis is present from the first.

Mr. Davis: I will object to that question unless—no, I will withdraw the objection.

Q. What I refer to is the diagnosis of pulmonary embolism and acute heart failure. The only difference is that at the onset of a pulmonary embolism there is a pallor which is succeeded by cyanosis, while in acute heart failure cyanosis is present from the first.

A. The time element in acute heart failure might be the difference, but the color, cyanosis is also present in embolism.

Q. This patient was operated at eight in the morning and at eleven that night he started on the last terminal period. A. No.

Q. You operated at eight or nine in the morning.

A. Yes, sir.

Q. And at eleven that night he started on the last terminal period. A. He certainly did not.

Q. That is your opinion of this hospital chart, Doctor? A. That is my opinion.

Q. Doctor Call, commencing about midnight of April 8, at 12:30 it says "respiration very irregular, deep at times [41] then patient seems to cease breathing for a few seconds and cyanosis of lips is obvious.

A. Yes, sir.

(Testimony of Dr. O. F. Call.)

Q. And you think he had started on the terminal period. A. No, sir.

Q. In this it says——

A. ——It says there that the pulse is irregular but strong.

Q. At 12:30 the chart shows cyanosis of lips, will you explain what cyanosis is?

A. It means a blue color of the skin, particularly the face due to lack of aeration in the lungs; that can come from holding one's breath. By snoring they stop breathing and also by the swallowing of the tongue, that is what this patient was doing.

Q. Did this patient do that at this time?

A. He was snoring all afternoon and all night. He was snoring at intervals all evening.

Q. You were there two or three times.

A. In the afternoon two or three times and at night again.

Q. Referring to 12:30, do you see any record of snoring when he started to turn blue?

A. He snored long before 12:30. The nurse doesn't chart the snoring at 12:30.

Q. The last time there was a record of it was 11 o'clock.

A. 11 o'clock, pulse good and color good, expectoration of [42] phlegm, respiration irregular but deep.

Q. And at 12:30 respiration very irregular and deep. A. Yes, sir.

Q. How do you account for his turning blue at midnight?

(Testimony of Dr. O. F. Call.)

A. I account for it from the fact that he was snoring whenever he was asleep and holding his breath.

Q. You are speculating on that?

A. It is a circumstance. It is not in the record but the nurse mentioned him snoring when I was there.

Mr. Eberle: I move to strike what the nurse said, if she is available they can get her.

The Court: That portion of the answer may be stricken.

Q. You are of the opinion that the clot broke loose from the pelvic vein?

A. That is the most probable place it would be.

Q. You don't think that clot could have come from the manipulation in the surgical procedure?

A. I don't think so.

Q. This clot might have come from any other portion of the venous system, in the extremities.

A. Particularly from the pelvis, that is the most common.

Q. If he coughed on the street the same thing could have happened.

A. It could have happened, where there is a pre-existing thrombus. [43]

Q. He could have been sitting in an arm chair and coughed and he could have died?

A. Yes, they have been known to die during the process of even giving an enema.

Q. Are those accidents?

A. That is according to the definition of accident.

Q. That could happen in any case.

(Testimony of Dr. O. F. Call.)

A. Sure.

Q. Assuming that a person has been to you for examination or in regard to a heart involvement, and you use the stethoscope, take X-rays of the chest, cardiograms both before and after exercise, taking all the tests you know and you find no pathology and the next day that man died of coronary occlusion or acute heart failure, would you call that an accident?

A. I don't know. It is something that is unexpected. After all these tests in certainly is something that is unexpected.

Q. Then you would say it is accidental?

A. I don't know. I didn't say that.

Q. Isn't it liable to happen?

A. Yes, but it is unexpected.

Q. It is something you can anticipate at any time in any person. A. I guess so.

The Court: We will adjourn at this time [44] until 1:30 this afternoon.

1:30 p.m., March 17, 1948

Mr. Eberle: I would like to offer exhibit 9 at this time, being a photostatic copy of the physician's report.

The Court: If there is no objection it may be admitted.

Q. Doctor, when you referred to snoring you referred to heavy breathing where the jaw muscles are relaxed and there is a vibrating of the palate?

A. Yes, breathing through the mouth with the mouth open.

Q. Snoring is a vibrating of the palate?

(Testimony of Dr. O. F. Call.)

A. Yes.

Q. That is because of relaxation of the jaw muscles.
A. Yes, sir.

Q. When you give a sedative it relaxes the jaw muscles and the mouth opens, the palate vibrates and that is snoring.
A. In some people.

Q. In this case.

A. This opiate relaxed the body as a whole.

Q. This sedative you gave Mr. Wilson was proper was it?
A. Yes, sir.

Q. As a natural consequence the jaw muscles relaxed?

A. You can say that except in specific cases.

Q. In this case. [45]
A. I assume it did.

Q. His mouth went open and in breathing his palate vibrated.
A. Natural snoring.

Q. Where there is a sedative or opiate, because of the relaxed condition, secretion runs down the trachea.
A. Yes, sir.

Q. That is true in any case where you have a sedative?
A. No.

Q. Why?

A. Because a lot of people don't relax the jaw muscles.

Q. Where there is a relaxation it is true?

A. Yes, sir, and it produces snoring.

Q. And labored breathing with the relaxation of the jaw muscles is not uncommon in post-operative procedure?

A. In varying degrees. Some will snore and

(Testimony of Dr. O. F. Call.)

others won't; particularly those who snore anyway, they will snore.

Q. The sedative relaxes the muscles and you have labored breathing because of the sedative?

A. No. The sedative relaxes the body as a whole. In a certain number of people it relaxes enough so that the jaw will drop.

Q. It is not uncommon?

A. It is not very common.

Q. It is a natural consequence of giving sedative in many people? A. A few people. [46]

Q. You only have relaxation and labored breathing in a few people? A. That is right.

Q. It is common in those people under opiates?

A. If you have a person who snores.

Q. Where you have snoring and relaxation after a sedative the secretion flows down the trachea?

A. Yes, sir.

Q. And a person under opiates makes an effort to clear his throat.

A. Not under opiate, but when he is not under he does.

Q. When he wakes up and finds this mucous in the trachea he tries to clear his throat?

A. Yes, that is natural.

Q. That is natural in the post-operative period?

A. In any case where there is mucous gathering in the throat.

Q. You encourage them to get this mucous up?

A. Yes, sir.

(Testimony of Dr. O. F. Call.)

Q. If you don't what does he get?

A. Metastatic congestion and atelectasis.

Q. So you encourage him to clear his throat?

A. Yes, sir.

Q. That is the normal process?

A. That's right.

Q. Does the vibration of the palate make any difference to [47] the secretion as that got down in the throat if the person snored?

A. I don't see much difference.

Q. So it doesn't make any difference whether he snored or not?

A. Snoring is apt to draw more mucous down.

Q. Would the mere fact that the palate vibrated make any difference in the amount of secretion?

A. That doesn't make secretion.

Q. That makes snoring?

A. Yes, snoring is a nasal sound.

Q. I thought you said that it was a vibration of the palate? A. That is part of it.

Q. It makes the noise?

A. Only part of it.

Q. And heavy snoring doesn't make any difference to the amount of mucous going down the trachea? A. That is right.

Q. Following an operation where you give an opiate or sedative there is a relaxation and a normal amount of mucous going down the trachea?

A. That's right.

Q. And the patient is encouraged to cough that up when he wakes up?

(Testimony of Dr. O. F. Call.)

A. That is right. [48]

Q. When did you first decide that this death was accidental?

A. Shortly after the operation, when I was there at five o'clock in the morning.

Q. Handing you exhibit 9, Doctor, will you give us the date of that?

A. The 22nd of April, 1947.

Q. That was about two weeks after the time you mention?

A. Yes, it was on the 7th he died, no, the 8th.

Q. At that time you were not sure that he died of an accident?

A. I didn't make any mention of accident, I mentioned pulmonary embolism.

Q. The question whether it was an accidental death, what was your answer to that?

A. Yes, providing embolism is classed as an accident.

Mr. Eberle: I believe that is all. I think, however, Mr. Merrill has some question.

The Court: Very well.

Cross-Examination

By Mr. Merrill:

Q. Doctor Call, is it your thought that the death of Harry Wilson was due to embolism?

A. Due to embolism?

Q. —let me finish the question. Do you think, and is it your thought that the death of Harry H. Wilson was due to [49] embolism independent of all other causes?

(Testimony of Dr. O. F. Call.)

Mr. Davis: I don't think that is answerable and I object to it for that reason. It cannot be answered. The question should recite independent of what other causes.

The Court: Of course, the question here is whether the operation was the cause or contributed to or was a contributing cause of the death. The other cause would be immaterial, however, he may answer.

A. An embolism has to have a basic cause for its formation, therefore the embolism would be the immediate cause of death but it would have to have a basic cause for formation.

Q. Therefore a death caused by embolism, was not that death caused by that independent of and from all other causes?

A. I cannot answer that yes or no.

Q. Would there have to be a cause for the embolism? A. Yes, sir.

Q. You say the immediate death was due to the embolism? A. Yes, sir.

Q. Doctor, what is herniorrhaphy?

A. Repair of a hernia.

Q. Was this embolism due to a herniorrhaphy?

A. No.

Q. I hand you what has been marked as defendant's exhibit 10,— [50]

Mr. Davis: I object to the witness being examined on this unless it is shown to him.

Mr. Merrill: Certainly.

Q. Do you recognize that?

(Testimony of Dr. O. F. Call.)

A. A certificate of death.

Q. Did you prepare it? A. Yes, sir.

Q. And certified to it? A. Yes, sir.

Q. That is a certified copy of the death certificate of the death of Harry H. Wilson?

A. I assume it is, it looks like it.

Mr. Merrill: I now offer in evidence the exhibit which is the certificate of death of Harry H. Wilson.

Mr. Davis: This is the certified copy you got from the bureau of vital statistics?

Mr. Merrill: Yes.

Mr. Davis: No objection.

The Court: Admitted.

Q. In answer to the question "immediate cause of death" you write "pulmonary embolism" and under "duration" you write "sudden."

A. Yes, sir.

Q. And in answer to the question "due to" you say; "herniorrhaphy" and under "duration" again you write "24 hours"? [51]

A. Yes, sir; may I qualify that statement? In all death certificates it is required that we give the cause of death and anything that had anything to do with it, and any connection. There could have been three or four causes contributing to the immediate cause of death, herniorrahaphy could only be a contributing cause.

"Q. What did you mean when you answered the question "due to" by using "herniorrahaphy"?

A. I meant it followed the herniorrhaphy.

(Testimony of Dr. O. F. Call.)

Q. At the time you made this certificate you felt that the herniorrhaphy or the hernia operation did have some effect upon the embolism, that the embolism was caused from the operation?

A. As a contributing cause.

Q. You admit that the hernia operation was a contributing cause?

A. A contributing cause, yes, we will have to admit that.

Q. Harry H. Wilson had a hernia,—withdraw that,—Harry H. Wilson was operated on for hernia because, of course, there was some need for it?

A. That's right.

Q. Twenty-four hours after, or about that time, following the operation he had what you call an embolism, pulmonary embolism?

A. Not what I call it; he had a pulmonary embolism.

Q. What you have termed a pulmonary embolism?

A. Yes, sir. [52]

Q. That pulmonary embolism was a contributing cause, or—no, strike that, please,—Doctor, that pulmonary embolism was contributed to by the operation?

A. As a secondary cause.

Q. A contributing cause?

A. Contributing.

Q. What could have been the primary cause if the hernia was the contributing cause?

A. Primarily it was due to the fact that there was a thrombus in the venous system.

Q. How do you know that?

(Testimony of Dr. O. F. Call.)

A. From post-mortems in thousands of cases.

Q. You said that you would not be sure without a post-mortem?

A. I testified that I could not be sure without a post-mortem, yes, sir, you are right.

Q. You cannot say positively that he died from an embolism?

A. From circumstances, evidence and history of the case only.

Q. You have no evidence that this clot came from any source other than the hernia operation?

A. I cannot answer that yes or no.

Q. Do you have any evidence whatever that if he died from pulmonary embolism, that embolism came from any other source than this operation?

A. Yes, sir.

Q. What evidence do you have? [53]

A. The evidence is what you would call circumstantial evidence.

Q. When did you come to the conclusion that he died from snoring, Doctor?

A. We came to the conclusion that he died from pulmonary embolism immediately after his death. We search our records before we make a decision; we try to explain it on a basis of existing facts. It is true in any case of death if it is not from external causes that you have to have a post-mortem in order to make a positive statement but we do have enough evidence to make it relatively sure. We came to this conclusion after an examina-

(Testimony of Dr. O. F. Call.)

tion of the case and an examination of the records of the case.

Q. What records?

A. The hospital and operative record.

Q. That is introduced in evidence?

A. Yes. That a herniorrhaphy was performed could be a contributing cause but twenty-four hours after the operation is too soon to have the embolism in the region of the hernia because of that operation.

Q. If you thought it was done by snoring why didn't you put it on the death certificate?

A. No place for it.

Q. What does the next sentence mean?

A. The same,—herniorrhaphy.

Q. What was the herniorrhaphy due to? [54]

A. Due to the operation at Mayo's.

Q. It all comes to this: If Harry H. Wilson had no hernia he would not have had an operation?

A. Sure.

Q. If he had no operation he would have had no herniorrhaphy? A. That's right.

Q. If he hadn't had the herniorrhaphy he would have had no embolism.

A. We don't know that.

Q. If there had been no operation there would have been no death?

A. We don't know that.

Q. It is probable that his death was due to the fact that he was operated on?

A. A contributing cause.

(Testimony of Dr. O. F. Call.)

Q. You are sure of that? A. Yes, sir.

Q. That it was a contributing cause?

A. That's right.

Q. No doubt about that? A. No.

Q. You would not say that if there had been no operation that Harry H. Wilson would have died on the 8th of April at 5 o'clock in the morning?

A. That's right.

Q. So it was the operation that set in motion that which ended in his death? [55]

A. Fundamentally, yes.

Q. And that was for the hernia? A. Yes.

Q. If this breathing or this snoring had anything to do with it, the operation was necessarily the inciting cause, was it not?

A. Yes.

Q. You would not have expected him to have died from snoring or breathing or anything it produced without the operation?

A. I don't think he would.

Q. And the operation was for hernia?

A. That's right.

Q. You stated that he was operated on twice?

A. That is right.

Q. Once for a bowel obstruction?

A. That is right.

Q. The second time was for hernia?

A. Yes, sir.

Q. And this was the second hernia operation?

A. That is right.

Q. If there was any clot that resulted in the

(Testimony of Dr. O. F. Call.)

embolism, it was certainly due to some of those operations?

A. I think it was from some of those.

Q. Then it was a condition within his body at the time of the last operation? [56]

A. Yes, sir.

Q. It was what we could term a bodily infirmity?

A. That's right.

Q. If he had no bodily infirmity there could not have been an embolism?

A. That is pretty broad. There are embolisms that form without bodily infirmities.

Q. This was not such?

A. This was bodily infirmity.

Q. Whether you say it came from the operation performed on April 7, or whether it came from some other cause, it was from bodily infirmity?

A. Yes, sir.

Q. That was ultimately the cause of his death?

A. Yes, sir.

Mr. Merrill: That is all.

Redirect Examination

By Mr. Davis:

Q. You were asked: "you would not have expected the patient to die without any operation" and you answered that "no"?

A. That's right, I would not expect him to die.

Q. Now, Doctor, you wouldn't and didn't expect him to die with the operation, did you?

A. No, I did not.

Q. There wasn't anything in the operation or

(Testimony of Dr. O. F. Call.)

preceding the [57] operation that led you to think the man might die?

A. That is right, there was not.

Q. When you speak of contributing cause, you are answering that generally and not with reference to your diagnosis of this particular case or this particular death? A. That is right.

Q. You are still of the same opinion that you were on direct examination that the cause of this man's death and the cause of this embolism was the violent, unusual and extraordinary coughing and snoring. That in your opinion was likely to cause this embolism to break loose?

Mr. Merrill: Objected to as an improper question.

The Court: He is qualified here as an expert; he may answer.

A. The cause of the death was acute embolism, pulmonary embolism which was caused by violent action to break the embolism from the thrombosis.

Q. Was there anything indicated to you at the time you operated or gave him the sedative that caused you to believe that he would develop this extraordinary condition of snoring or breathing or holding his breath?

Mr. Merrill: Objected to, there is no testimony to support this type of question.

The Court: I will permit him to answer. [58]

A. No.

Q. Doctor Call, with reference to your experience in operations, was or was not the condition

(Testimony of Dr. O. F. Call.)

that existed there or the condition that developed with reference to the snoring, choking and the stopping of breathing a most extraordinary condition? A. It was.

Q. And was it to be expected?

A. No, sir.

Q. It was not to be expected that it would develop? A. No, it was not.

Q. Was it an unforeseen occurrence?

Mr. Merrill: Objected to as repetition.

The Court: He may answer.

Q. I call your attention to the definition in Webster's International Dictionary of accident; that defines an accident as "a befalling; an event that takes place without one's foresight or expectation, an undesigned, sudden, unexpected event; chance; contingency, often an undesigned and unforeseen occurrence of an afflictive or unfortunate character, a casualty, a mishap, as, to die of accident." Now, Doctor, I will ask you if the event of the patient's death under the circumstances, in your opinion, was an event that took place without foresight and expectation? [59] A. It was.

Q. Was it undesigned, sudden and unexpected?

A. It was.

Q. Was it a chance? A. It was.

Q. Due to contingency? A. It was.

Q. Was it an undesigned and unforeseen occurrence of an afflictive or unfortunate character?

A. It was.

Q. Was it a casualty? A. It was.

(Testimony of Dr. O. F. Call.)

Q. Was it a mishap? A. It was.

Q. Did he die, in your opinion, by accident?

A. He did.

Q. Now, with reference to this condition, this unexpected condition that occurred there with reference to the choking and snoring, was that an event that took place without foresight and expectation? A. That's right.

Q. Was it undesigned? A. It was.

Q. Was it a chance? A. It was. [60]

Q. A contingency? A. Yes, sir.

Q. Was it an unforeseen and undesigned occurrence of an afflictive or unfortunate character?

A. It was.

Q. And was it a mishap?

A. Yes, sir, certainly.

Q. In your opinion it was the direct cause of the man's death. The main cause, and the principal and moving cause of the man's death?

A. Yes, sir.

Mr. Merrill: Objected to as leading.

The Court: He has answered and the answer may stand.

Q. Now, Doctor Call, you testified that there was a possibility in every case that a person might die. Do you understand that possibility comes within the definition of accident?

Mr. Merrill: I object to that, it is beyond the opinion or conclusion of an expert.

The Court: I would like to have the Doctor reconcile this answer, or rather the answer to the

(Testimony of Dr. O. F. Call.)

question previously asked with the answer to Mr. Merrill's question. He answered Mr. Merrill's question that it was a contributing cause of death.

A. We always have a contributing cause.

The Court: Regardless of any death certificate, Doctor, you answered Mr. Merrill's question in which you said that the operation was the contributing cause of his death. Now, you may reconcile that answer with the answer to Mr. Davis that this was an accident within the definition given in the dictionary.

A. I think maybe I could do better if I may use an illustration.

The Court: Certainly, that is all right.

A. If you were riding in a car and the car was being driven over a road where there was a large chuck-hole unforeseen by the driver,—the driver hits the chuck-hole and throws the car over and one is killed, the driving of the car is the contributing cause, just as the hernia is the contributing cause here.

Q. How would the hernia be the contributing cause?

A. Well, you might say, it takes the patient away from his normal way of living.

Q. It is your opinion that the man would not have died without an operation for hernia?

A. That is right.

Q. And with reference to driving the car and hitting the chuck-hole, the snoring and breathing is that comparable to the chuck-hole?

(Testimony of Dr. O. F. Call.)

A. That's right.

Q. Then you testify that if the man had not had the hernia [62] this choking would not have occurred and that the hernia is not the cause, or did not cause death.

Mr. Merrill: Objected to as argumentative and leading.

The Court: It is, but that is the question we are trying to get at here.

A. In putting that question to me, the answer is again, that the snoring is comparable to the chuck-hole in the road.

Q. Dr. Call, you have made answers here that would indicate, if you understood the way counsel was asking the question, that the hernia operation caused the death. Now, as I understand it, the fact that he was there,—is that what you meant, Doctor, the fact that he was in the hospital for an operation put him in the position for the other thing to happen and that the other thing caused his death? A. That is right.

Q. And that is your studied opinion?

A. Yes, sir.

Q. Any man in this Court room may die before he gets to the foot of the stairs?

Mr. Merrill: Objected to as immaterial.

Mr. Davis: This was all gone into on cross.

The Court: He may answer. [63]

A. Certainly.

Q. But it would certainly be a calamity?

A. Yes, and unexpected.

(Testimony of Dr. O. F. Call.)

Mr. Davis: That is all, Doctor.

Recross-Examination

By Mr. Merrill:

Q. If the snoring was the chuck-hole as you say and the immediate cause of death was——

A. ——I said it was the chuck-hole that caused the embolism, the snoring was comparable to the chuck-hole in the road that caused the car to turn over.

Q. It all comes back to the operation?

A. That is comparable to the car in which he was riding.

Q. It was the commencement, the thing that set in motion everything that resulted in the death. The cause of the death.

A. The operation was the contributing cause of the death. A. Yes.

Q. And it was due to hernia? A. Yes, sir.

Q. The hernia was the contributing cause of death? A. That's right.

Q. There is no accidental means involved?

A. No external violence. [64]

Mr. Merrill: That is all.

Recross-Examination

By Mr. Eberle:

Q Doctor Call, I am not clear on this Did you reason that the snoring was the cause of the breaking of the thrombus and the cause of the embolus getting into the blood stream?

(Testimony of Dr. O. F. Call.)

A. The violent action of the snoring broke the embolism from the thrombus or thrombosis.

Q. If I snore I may break a thrombosis loose and cause an embolism?

A. I am testifying about this case, Mr. Eberle.

Q. Just the snoring broke loose the embolus?

A. I didn't say the snoring, but the snoring and the violent action.

Q. The snoring and coughing?

A. The violent action.

Q. Did the snoring break loose the embolism?

A. I didn't so testify.

Q. But is it your testimony that the snoring and coughing did?

A. The snoring, coughing and the violent action.

Q. What would snoring have to do with the breaking loose of a thrombus in the pelvic region?

A. The snoring produced a lot of mucous in the respiratory tract and that dropped into the throat; this made him [65] struggle and the struggling would break it loose.

Q. It was coughing and struggling; I thought you testified that snoring was a vibration of the palate? A. That is what you said.

Q. What did you say?

A. It was a form of breathing associated with the vibrating of the palate.

Q. How does it differ from labored breathing?

A. It relaxes and drops down and shuts off the breath.

Q. What shuts off the breath, Doctor?

(Testimony of Dr. O. F. Call.)

A. The tongue, and the secretion dropping into the throat.

Q. That is due to the sedative given the patient?

A. No, sir, not the sedative.

Q. The relaxation of the muscles causes the tongue to drop back?

A. Yes, and the violent catching of his breath again forces it back to the normal position.

Q. The mucous and secretion that get down in the trachea due to the relaxation from the opiate.

A. Not that,—it was mucous in the respiratory tract.

Q. Yes, and you clear that out,—naturally you clear your throat when that gets down in the throat? A. If you are not asleep.

Q. When you are asleep the natural tendency is to drain down?

A. The tendency is the same whether he is given an opiate [66] or not. A snorer does the same thing without an opiate.

Q. In ordinary life he would do it without an opiate? A. That's right.

Q. His action during this operation and subsequent was no different than in ordinary life?

A. That is correct.

Q. This could have happened in bed any night?

A. Or walking down the street.

Q. It was in no way due to the fact that he was in the hospital?

A. He was quite a snorer in an operation or not in an operation.

(Testimony of Dr. O. F. Call.)

Q. His coughing and snoring was no different?

A. No different except his condition was weakened by reason of his being a sick man.

Q. Then you think this happened because of his weakened condition? A. Sure.

Q. So after all, Doctor, the contributing cause was by reason of the weakened condition or bodily infirmity, by reason of his condition at that time?

A. That's right.

Q. Now, we have two bodily infirmities that he had. Thombosis formed about four years prior when he had the original hernia operation and his condition—— [67]

A. ——he had another operation also.

Q. But it was an operation for hernia he had some four years ago, wasn't it? A. Yes, sir.

Q. At that time there was a bodily infirmity in the way of a thrombosis? A. Yes, sir.

Q. And it was because of his coughing that the thrombus was broken loose and went into the blood stream? A. Yes, sir.

Mr. Eberle: I think that's all.

Mr. Merrill: Nothing further.

Mr. Davis: That's all, Doctor. I will call Doctor Brothers.

W. W. BROTHERS,

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. What is your profession?

A. Surgeon.

Q. How long have you lived in Pocatello, Doctor?

A. Since 1919.

Q. How long have you specialized in surgery?

A. I was certified as a specialist in 1926 by the American [68] College of Surgeons.

Q. You are a member of the College of Surgeons?

A. Yes, sir.

Q. And have you done post-graduate work in surgery from time to time?

A. Yes, sir.

Q. You were an officer in the first world war?

A. Yes, sir.

Q. Did you do surgery extensively then?

A. Yes, sir.

Q. You were in the last world war?

A. Yes, sir.

Q. Your rank at discharge was what?

A. Colonel.

Q. Were you in that war in the capacity as a Doctor from the commencement to the close of the war?

A. Yes, sir.

Q. Were you in charge of any Government Hospital?

A. Yes, I was.

Q. Whereabouts?

A. In charge of all medical installation at Head-

(Testimony of W. W. Brothers.)

quarters in Algiers, A F H Q, also in charge of medical and surgical installation at Supreme Headquarters in London and Paris and Frankfort.

Q. Did you do surgery there? [69]

A. Very little.

Q. Was it done under your supervision?

A. Yes, it was.

Q. How extensive was that?

A. Most of it was referred, we didn't do a lot at headquarters.

Q. You were consulted in those matters all the time? A. Yes, sir.

Q. You are a graduate of a recognized medical school? A. Yes, Northwestern University.

Q. Did you know Harry H. Wilson, personally?

A. Yes, sir.

Q. Were you at any time his family physician?

A. I took care of Harry a time or two, years ago.

Q. You were well acquainted with the family?

A. Yes, sir.

Q. You took care of his children?

A. Yes, sir.

Q. And of Mrs. Wilson? A. Yes, sir.

Q. You were familiar with his physical condition, generally? A. Yes, sir.

Q. And his general characteristics?

A. Yes, sir.

Q. Could you give us an estimate of how many hernia operations you have performed or assisted in performing?

(Testimony of W. W. Brothers.)

A. I don't know, I haven't kept any record. I have done a [70] lot of hernias. I did over a hundred the first year in the army in World War One.

Q. Have you done six or seven hundred?

A. At least.

Q. Out of the six or seven hundred, how many post-operative deaths from hernia operations by pulmonary embolism have you had?

A. None.

Q. How many post-operative deaths from any cause after these hernia operations have you had?

A. I have never had a hernia patient die.

Q. I assume in all operations,—hernia, pelvic and abdominal operations that you have performed,—I suppose you have performed a great many, probably more than a thousand?

A. Yes, sir.

Q. How many post-operative—in all of those operations have you had pulmonary embolism?

A. I have had one.

Q. What is your opinion as to whether post-operative death following operations for hernia where the cause is pulmonary embolism is a rarity?

A. It is very rare.

Q. Would that be unexpected?

A. Yes, sir.

Q. Now, Doctor Brothers, you as a surgeon are familiar, and [71] from studies you have an opinion as to when post-operative deaths, following operations, are most likely to occur from embolisms?

(Testimony of W. W. Brothers.)

A. How soon following operations are deaths from embolisms likely to occur?

Q. Yes. You have an opinion as to that, do you, Doctor?

A. Yes, sir, it is most likely to occur from the second week following the operation to the third week. They occur at a time when the patient is thought to be practically well, or well on the road to recovery.

Q. Have you carefully studied the hospital chart and the bedside notes marked exhibit 7 in this case?

A. Yes, sir.

Q. That is the history and record of Harry H. Wilson?

A. Yes, sir.

Q. Have you read the deposition of Doctor Beeson, Doctor Swindell, Doctor Pittenger and Doctor Stewart?

A. Yes, sir.

Q. Have you familiarized yourself as much as possible with the record and the testimony that is available concerning Mr. Harry H. Wilson, now deceased?

A. I have.

Q. Do you have an opinion as to the cause of his death?

A. I have.

Q. What is that opinion? [72]

A. I think he died of pulmonary embolism.

Q. In your opinion, from the record, and I think you heard the testimony of Doctor Call?

A. Yes, I did hear it.

Q. From the record and that testimony was that pulmonary embolism an event that took place without foresight and expectation?

A. Yes, sir.

(Testimony of W. W. Brothers.)

Q. Was it an undesigned, sudden and unexpected event? A. Yes, sir.

Q. And was it by chance? A. Yes, sir.

Q. Was it an undesigned and unforeseen occurrence of an afflictive and unfortunate character? A. Yes, sir.

Q. Was it a casualty? A. Yes, sir.

Q. Was it a mishap? A. Yes, sir.

Q. Now, Doctor, in your study of the history of this case is there anything to indicate that this man had any profound shock after the operation, before his death? A. No, sir.

Q. What do you say as to whether he had any shock at all?

A. According to the record there was no evidence of surgical shock. [73]

Q. Why do you say that?

A. The nurse's notes chart the patient's pulse at regular intervals and his pulse did not exceed 72 at any time after the operation.

Q. If he was suffering shock after the operation what would his pulse be?

A. Rapid, feeble pulse. Very rapid, a hundred and over, on up to where they cannot count it.

Q. Now, Doctor Brothers, what, in your opinion, caused this pulmonary embolism and why do you say it was accidental?

A. The exciting cause of the pulmonary embolism in my opinion was the exertion of his unusual type of snoring and coughing, that is the exciting cause. The remote cause is, of course, a thrombus.

(Testimony of W. W. Brothers.)

There has to be thrombosis or some foreign material to produce embolism.

Q. Anything in the blood stream that is caused to move by coughing or anything else would cause pulmonary embolism? A. Yes, sir.

Q. Is there anything, in your opinion, basing it on your long experience, that would have indicated or caused a surgeon to expect this violent or extraordinary type of snoring and this exertion?

A. No.

Q. Was it unexpected? A. Yes, sir. [74]

Q. What is your opinion, Doctor, as to whether pulmonary embolism—strike that, please,—in your opinion is there any substantial difference in the symptomatology of pulmonary embolism and thrombus? A. Yes, sir.

Q. What is the difference?

A. They are different conditions. Thrombosis may exist without symptoms, entirely without symptoms, pulmonary embolism is very dramatic, a sudden thing, and causes death in a very few minutes if it is a large embolus?

Q. With reference to the percentage of deaths that follow hernia as post-operative deaths, what is your opinion as to whether that is high or a very low percentage?

A. In my opinion it is very low. In my personal experience I never had one. I never saw any of my associates have one.

Q. You heard my question of Doctor Call from this Text Book by TeLinde. A. Yes, sir.

(Testimony of W. W. Brothers.)

Q. Is that a recognized work?

A. Yes, sir.

Q. It is prepared by a Doctor who was taking his record, or making his record from the results of Johns Hopkins and Mayo Clinics?

A. Yes, sir. [75]

Q. Now, Doctor, I call your attention to a statement on page 87 as follows: "Pulmonary embolism is one of the most dramatic and tragic accidents that occur in surgery." Do you agree with that?

A. Yes, I do.

Q. The accident may occur in surgery without being the result,—let me put it this way. The accident may occur in surgery without surgery being the cause of the accident?

A. Yes, sir, that is right.

Q. Referring to post-operative deaths. The accident after surgery doesn't mean that surgery is the exciting cause of that death, or that surgery caused the death at all?

A. No, sir.

Q. There can be accidents in surgery?

Mr. Merrill: We object to that as argumentative, leading and suggestive.

The Court: The rule is that a pretty broad scope is allowed where you are examining an expert as this witness is. You may continue with the question.

Q. There is an occasional accident in surgery the same as there may be an accident in anything else?

A. Yes, sir.

(Testimony of W. W. Brothers.)

Q. The accident would not have to be caused by the surgery at all, would it, Doctor?

A. No, sir. [76]

Mr. Merrill: Move to strike the answer for an objection.

The Court: It may be stricken for the purpose of the objection.

Mr. Merrill: Objected to as leading.

The Court: Overruled, the answer may be reinstated.

Q. That, as I understand it, in your opinion, is what happened. There was an accident not connected with the surgery. A. That's right.

Q. It is your opinion that surgery was not the contributing cause to the pulmonary embolism at all?

Mr. Merrill: Objected to as leading.

The Court: He may answer.

A. That is right.

The Court: I think that question was a bit leading, Mr. Merrill, but this is an expert and it is tried before the Court. The answer may stand.

Mr. Davis: That is all, Doctor.

The Court: We will recess for ten minutes.

3:45 P.M., March 17, 1948

Mr. Davis: I wonder if I may ask another question or two.

The Court: Yes, you may.

Q. It was your opinion based on the facts pro-

(Testimony of W. W. Brothers.)

duced here which [77] facts are available to you in this matter,—may that be stricken, please?

Q. Doctor Brothers, will you give us your opinion based upon the facts as produced here, which are available to you in this matter, as to whether or not this death would have been likely to occur under the same conditions, of extra-ordinary snoring and coughing, regardless of whether the operation had been performed or not?

Mr. Merrill: Objected to as not proper, there is no foundation and it calls for a conclusion and therefore it is incompetent.

The Court: He may answer.

A. Yes, sir, I think he probably would have died just the same whether he would have been operated at all.

Q. In your opinion it would have been an accident as it has been defined here? A. Yes, sir.

Mr. Davis: That is all, you may examine.

Cross-Examination

By Mr. Eberle:

Q. With reference to the testimony as to an accident. Is death an accident?

A. It is not so defined, always.

Q. In your opinion is death an accident?

A. Sometimes. [78]

Q. Is it an accident when it is dramatic?

A. That is part of the definition of accident, a dramatic occurrence.

Q. Not every dramatic death is an accident, is that correct? A. I would not think so.

(Testimony of W. W. Brothers.)

Q. Suppose that Mr. Wilson went home to dinner and sat down, cleared his throat and had an embolism and died, would that be an accident?

A. I think so.

Q. If a person dies while sitting in a chair, of embolism, is that an accident?

A. I think so.

Q. Is post-operative pneumonia an accident?

A. Not ordinarily, no.

Q. Is post-operative shock an accident?

A. I don't think so.

Q. It would be dramatic? A. Yes, sir.

Q. It would be sudden?

A. Not as sudden as embolism.

Q. Pretty sudden?

A. Rather a short time.

Q. Would it be undesigned?

A. Without design, I think so. [79]

Q. But still not an accident? A. No.

Q. Would it be expected?

A. You would have more warning, depending on the type of operation, you might expect shock.

Q. What percentage of post-operative deaths are due to shock? A. I don't know.

Q. Is it rare? A. Rather rare.

Q. Is it rather rare if you die from post-operative shock and if you die from pulmonary embolism? A. Yes, sir.

Q. What is the distinction?

A. Well, embolism is the breaking off of a clot which is caused by unusual exertion. The break-

(Testimony of W. W. Brothers.)

ing off of this clot causes the fragment of broken portion to float through the blood stream; that happens as the result of unusual exertion. Exertion is the exciting cause.

Q. If I walk down the street and create an embolism and I die, that is an accident?

A. Yes, sir.

Q. That is your opinion of an accident?

A. Yes, sir.

Q. Is that expected, Doctor? A. No, sir.

Q. And shock is not expected? [80]

A. You might expect shock if you had a severe blood loss or a severe operation.

Q. Inasmuch as recent years have produced penicillin and other drugs, what is the greatest single factor that a surgeon has to face with regard to post-operative deaths?

A. I think shock is one of the greatest.

Q. Not embolism?

A. It does not occur to me that it is that common.

Q. Do you belong to the American College of Surgeons? A. Yes, sir.

Q. And would you report that as a rare case to the College of American Surgeons?

A. No, there have been lots of reports.

Q. You would not report it as unusual?

A. I think of it as unusual.

Q. I didn't ask you that.

A. No, I wouldn't report it because many have been reported.

(Testimony of W. W. Brothers.)

Q. You said that in your opinion the cause of death was pulmonary embolism. What records did you use? A. The hospital records.

Q. From the hospital record introduced in evidence here as exhibit 7 you concluded from that record that the man died from pulmonary embolism?

A. That is right.

Mr. Davis: That is not a question. [81]

The Court: Perhaps not, but the witness answered. It may stand.

Q. Referring to the pulmonary embolism, did you rely on this hospital record?

A. I think there is enough in the record to indicate that it was pulmonary embolism.

Q. You based your opinion on that?

A. Largely.

Q. What are the symptoms of pulmonary embolism?

A. It has a very few preliminary symptoms. They die within two to fifteen minutes from the onset of the embolus. They die very suddenly. They have very few symptoms, some pain in the chest. They may cough and suddenly stop breathing.

Q. It is the stopping of respiration and pain in the chest? A. Yes, there is that.

Q. Is there any indication of pain in that record in the last hour or two?

A. There is no mention of pain.

Q. Did you hear Doctor Call testify that he was

(Testimony of W. W. Brothers.)

familiar with the snoring and breathing condition of Mr. Wilson? A. Yes, sir.

Q. I think you said that the condition of his bodily infirmity with reference to the snoring and coughing was the exciting cause of the embolism?

A. Yes, sir.

Q. Why did you say it was unexpected if Doctor Call knew in advance that he had this coughing?

A. The Doctor didn't know he had the thrombus.

Q. Why was it unexpected if he knew of the bodily infirmity with reference to the snoring and so forth?

A. If you consider that the exciting cause, he still has to have the thrombus.

Q. Did you hear Doctor Call say he knew he had several operations for hernia prior to this operation? A. I understood that he had one.

Q. Does a surgeon know, where there has been an operation, does a surgeon know there might well be thrombosis?

A. Yes, he might think there might be thrombosis, however, it might be present without symptoms.

Q. Even if there had been a herniorrhaphy or herniotomy; you might anticipate there was a thrombus, isn't that right?

A. I don't think so.

Q. You don't think so, what word would you use instead of anticipate?

(Testimony of W. W. Brothers.)

A. In the absence of symptoms you would not anticipate nor expect a thrombosis.

Q. A surgeon knows where there has been surgical procedure there is a possibility of thrombosis existing? [83]

A. Yes, sir, there is a possibility.

Q. You rather use the word possibility?

A. Yes, that is the word to use.

Q. It is a hazard in every surgical procedure?

A. Yes, sir.

Q. It is a hazard where a surgeon operates the second time? A. Yes, sir.

Q. He knows of the existence of the hazard?

A. Yes, sir.

Q. Not only did Doctor Call know of the existence of the hazard by reason of the first surgery, but also he knew of the snoring and breathing proclivities of this person. He knew of that hazard?

A. I suppose that is true.

Q. Generally, where there is a thrombus from which portions may be broken, quite often the amount of coughing is immaterial, isn't that true?

A. Immaterial in what way?

Q. A rather light cough might break the thrombus loose in one instance, or a heavy cough in another? A. Yes, sir; that is true.

Q. It doesn't always take a heavy cough?

A. It would be more apt to break.

Q. Even though he had a comparatively light cough it might have broken off the embolus? [84]

A. It is possible.

(Testimony of W. W. Brothers.)

Q. Speaking of accidents again. In your opinion where an operation is skilfully performed and the man dies, is that an accident?

A. It would depend on what caused his death.

Q. You have heard the statement "the operation was a success but the patient died." In this instance where the surgical procedure was proper and no infection occurred and the man dies, is that an accident?

A. If he dies of pulmonary embolism, I would say yes.

Q. Why do you say that is an accident?

A. It is so definitely an accident. It is an unforeseeable, unexpected and tragic death.

Q. Is there any other tragic cause of death?

A. Gunshot wound.

Q. Post-operative deaths?

A. I don't think you have any like pulmonary embolism.

Q. Is death by coronary occlusion sudden?

A. Yes, it is sudden.

Q. Is it dramatic? A. Yes, sir.

Q. Is it undesigned?

A. Yes, sir,—well, there is a cause for coronary occlusion.

Q. Is it an accident?

A. I would not say so, no, I wouldn't think it is an accident [85] excepting when an embolus is concerned, and that is thrombosis.

Q. You think coronary thrombosis is an accident? A. No.

(Testimony of W. W. Brothers.)

Q. It is dramatic? A. Yes, sir.

Q. Sudden? A. Yes, sir.

Q. Undesigned? A. Yes, sir.

Q. Unexpected?

A. You might expect it if you had a cardiogram.

Q. If the cardiogram showed no pathology,—that is possible, isn't it, Doctor?

A. Yes, it is possible.

Q. Would that be an accident?

A. No, I don't think so.

Q. So thrombosis plugging an artery of the heart with a clot is not an accident, but an embolus coming from the venous system and plugging a vein of the lung is an accident? A. Yes, sir.

Q. Is a surgeon aware of the danger of an embolism or shock every time he operates?

A. Yes, sir, he is always aware of it.

Q. In every operation?

A. Yes, sir, he is always aware of danger.

Q. You never know whether in a particular case there may be [86] an occlusion or thrombosis,—those are dangers that may be present?

A. Yes, but they don't concern you very much because they are very rare.

Q. So rare that you would report it to the American Medical Association if you found one?

A. No, sir.

Q. Have you made any study of the percentage of post-operative deaths due to hernia operations?

A. Not hernia alone.

(Testimony of W. W. Brothers.)

Q. Do you know whether in preparing statistics at Mayo's they have come to the conclusion that there are five times as many pulmonary embolisms following hernia operations as there are in operations for appendicitis?

A. Yes, I know that is a statement they put out.

Q. Where there is a psychological poison due to changes in bodily functions brought about by anesthetic, would you consider that an accident?

A. Psychological?

Q. Yes.

A. I don't understand that, I would rather think you mean pathological.

Q. Would you consider that would be accidental?

A. Yes, I would think so.

Q. From the anesthetic? [87]

A. That would not be the normal result.

Q. Doctor, you say in this case the accident was not connected with the surgery?

A. In my opinion it was not.

Q. Do you rule out the embolus from the lower extremities?

A. Most likely place would be in the pelvic veins.

Q. Ordinarily emboli originates in the lower extremities?

A. Most commonly in the illiac and larger veins of the leg and prostate.

Q. There is no reason that it would not originate in there in this case?

(Testimony of W. W. Brothers.)

A. Except that the original hernia operation might have left a thrombosis.

Q. Yes, except that the original hernia operation may have left a thrombosis.

A. That is right.

Q. As between the two it is pure speculation?

A. That's right, yes, sir.

Q. You stated that you base your opinion upon the theory that the embolus could not be coming from ligation or manipulation because of the short time?

A. Yes, sir.

Q. But there are cases that arise in that short time?

A. That is extremely rare.

Q. But it is possible. [88]

A. That's right, it is possible.

Q. Does so-called snoring increase the secretion that would go down the trachea or does it reduce it?

A. There is somewhat of an irritation by this flapping of the soft palate that might increase the secretion.

Q. It is good procedure to require and to cause the patient to cough up that phlegm?

A. Yes, sir.

Q. Opiates and sedatives are proper procedure?

A. Yes, sir.

Q. They relax an individual, some more and some less?

A. Yes, sir.

Q. It is not uncommon that a person may be relaxed a great deal?

A. That's right.

Q. The jaw muscles of persons relax and the mouth might drop?

A. Might drop open.

(Testimony of W. W. Brothers.)

Q. And he may be so relaxed that those muscles don't operate? A. Yes, sir.

Q. As a result of the opiate,—strike that,—as a result of the relaxation following an opiate and the flowing of this secretion from the relaxation, it is proper procedure to require coughing to bring up the secretion? A. That's right.

Q. That cough might be light or heavy? [89]

A. Yes.

Q. It might be light or heavy and still bring on an embolism? A. Yes, sir.

Mr. Eberle: That is all, Doctor.

Cross-Examination

By Mr. Merrill:

Q. You say that it is extremely rare but possible that pulmonary embolism may come from an operation within a period of twenty hours, that is the effect of your testimony? A. Yes, sir.

Q. So it was possible that this pulmonary embolism may have come from this operation?

A. Possible but not probable.

Q. What, aside from the time in the record that would cause you to conclude that it was not probable? A. Just the time element.

Q. That is all? A. Yes, sir.

Q. You admit that the time element is long enough for a possible embolism from the operation?

A. Yes, I admit it is possible but not probable.

Q. So, therefore, you are basing your opinion on

(Testimony of W. W. Brothers.)

probabilities and possibilities rather than any specific facts?

A. I am basing my opinion on the most likely thing that happened.

Q. But you do and you must admit that it is possible that [90] the embolism was the result of the hernia operation, if it was an embolism?

A. I don't think it was due to the hernia operation.

Q. There is a possibility?

A. A bare possibility.

Q. It does occur in that period of time?

A. Very rarely.

Q. You have nothing except your own opinion and the element of time that causes you to conclude that?

A. That is right.

Q. You speak of embolism caused by thrombosis, now, what causes the thrombus?

A. It is caused by different things; prior surgery; injuries; infection of the vessel walls; foreign material in the blood stream; endocarditis.

Q. And everyone of those go back to a bodily infirmity?

A. Injuries and prior operations, you would not call them diseases.

Q. But it is a bodily infirmity?

A. Yes, it is.

Q. The fact that this man had been operated on twice before that would create a probability for the thrombosis?

(Testimony of W. W. Brothers.)

A. Yes, sir; I think he had some damage to the circulatory system in the abdomen.

Q. If he had not been operated before you know of nothing [91] that could have created thrombosis in Harry Wilson?

A. Yes, it might occur at any time from slowness of the blood flowing. He might have thrombosis and not know it.

Q. It would be due to a bodily infirmity.

A. It might be due to the slowness of the blood stream; it could clot.

Q. It would be a bodily infirmity, a strong, healthy man would not have thrombosis?

A. Yes, he might.

Q. It would be due to bodily infirmity?

A. If you call stasis an infirmity.

Q. Have you any theory upon which you can base your conclusion as to the origin of this thrombosis? A. I don't know where it was.

Q. You cannot say that it wasn't connected with this operation? A. I don't think it was.

Q. You have no way of saying that?

A. Yes, this thing occurred too soon following this surgery to have been caused by it.

Q. The element of time is the only thing you have to conclude that? A. Yes, sir.

Q. The thrombosis may have been due to a preceding operation? A. That's right.

Q. You have no means of saying it was?

A. No, sir. [92]

Q. The preceding operation was for hernia?

(Testimony of W. W. Brothers.)

A. Yes, I understand so.

Q. So hernia may have contributed to this embolus.

A. I think it was the abdominal operation.

Q. It was a hernia operation that preceded this one.

A. It is very apt to occur where you have the operation for the internal obstruction.

Q. Have you examined the record of this operation? A. No, sir.

Q. You have nothing upon which to base your conclusion. It is simply a guess.

A. Nothing only I know he was operated.

Q. Do you mean to say, Doctor, that in your opinion Harry Wilson would have died at five o'clock in the morning April 8, 1947, whether there had been any operation or not? A. He might have.

Q. It is your opinion that he would?

A. I think he would.

Q. From what do you think he would have died?

A. Embolism.

Q. What would have caused it?

A. Thrombosis.

Q. When did he have thrombosis?

A. I think he had it before this operation. [93]

Q. What evidence do you have for that conclusion?

A. I don't have any except this record.

Mr. Merrill: That is all.

(Testimony of W. W. Brothers.)

Redirect Examination

By Mr. Davis:

Q. Counsel examined you about post-operative deaths, and in his examination indicated that hernia post-operative deaths were not rare and asked you about a statement concerning Mayo's to the effect that there was five times more post-operative deaths following hernia operations than there was following something else. Now, Doctor, would that determine anything unless you know the number of hernia operations? A. No.

Q. What is the ratio between operations for hernia and appendicitis, is hernia more common?

A. I can't answer that now.

Q. Do you know how many millions of hernia operations are performed?

A. That depends on the type of operations.

Q. And the question of rarity of death following those operations would depend, not upon the percentage of some other disease but on the number of hernia cases as a total and the number of deaths, and that would determine the total would it not, that is, it would determine the total percentage. [94]

A. Yes, sir.

Mr. Davis: That is all.

Recross-Examination

By Mr. Eberle:

Q. Post-operative pulmonary embolism is more likely to occur in older than in younger aged persons.

A. That is right.

(Testimony of W. W. Brothers.)

Q. You know that Mr. Wilson was sixty-one.

A. Yes, sir.

Q. He would be more predisposed to it than a man thirty or forty.

A. Yes, sir.

Q. The reason that post-operative embolisms are more in hernia cases than in appendectomy cases is because appendectomy occurs earlier in life.

A. That is true.

Mr. Eberle: That is all, Doctor.

Mr. Davis: May the Doctor be excused from further attendance?

The Court: Unless counsel want him to stay I think the Doctor should be allowed to go.

Mr. Davis: Plaintiff rests.

DR. MELVIN M. GRAVES

Called as a witness by the defendant, after being first duly sworn, testifies as follows: [95]

Direct Examination

By Mr. Eberle:

Q. How long have you been in Pocatello?

A. About one and a half years.

Q. State briefly your formal education.

A. BA Western Reserve University and MD at Harvard Medical School. I have had about eight years hospital training experience limited solely to surgery.

Q. Have you specialized in surgery for eight years?

A. Yes, sir.

(Testimony of Dr. Melvin M. Graves.)

Q. Are you a fellow in the American College of Surgeons? A. Yes, sir.

Q. Certified by the American Board of Surgery?
A. Yes, sir.

Q. Are you the only Doctor in Pocatello so certified?
A. So far as I know.

Q. You have had practical experience in herniorrhaphy?

A. I am a general surgeon and do a lot of hernias.

Q. During those years and while you were an interne what experience have you had with pulmonary embolism?

A. I have seen quite a few such cases.

Q. Have you made a study of the cause and effect of emboli? A. Yes, sir.

Q. Also the statistics as to their occurrences.

A. Yes, sir. [96]

Q. Doctor, will you tell us briefly a surgeon's attitude toward any sort of embolism as to whether it is expected, anticipated and reasonably foreseen?

A. It is one of the complications which a surgeon may encounter in following major surgery.

Q. Is it the principal cause of post-operative deaths?

A. You mean by that, all post-operative deaths—I would rather alter that to limit it to hernia.

Q. Well, limit it to hernia.

A. It is the most common cause in hernia operations.

Q. Are there any precautions to avoid or prevent post-operative embolism? A. Yes, there are.

(Testimony of Dr. Melvin M. Graves.)

Q. State generally what they are.

A. Early ambulation; getting the patient up soon after surgery so he is not bedfast.

Q. Pre-operative procedure I referred to in particular.

A. Well, there are certain clinics where rather radical type of treatment is done, that is ligation of femur veins in both legs on all patients in the older age group who are subject to any major surgery.

Q. Are you familiar with the percentage of cases in all age groups, of post-operative deaths resulting from pulmonary embolism?

A. In large hospitals where such statistics can be gathered [97] approximately one in eight or nine hundred.

Q. That is major surgery of any kind.

A. Yes, sir.

Q. What could you say as to a surgeon commencing surgical procedure as to whether he could reasonably foresee pulmonary embolism in any surgical procedure?

A. It is something every surgeon undertaking an operation knows might happen and hopes won't happen.

Q. It is reasonably foreseeable in any operation?

A. I think that is a fair statement, yes, sir.

Q. What are the statistics with reference to hernia operations?

A. The present mortality rate for all hernias in well-run institutions should run one and a half to two per cent mortality—should be below that—ar-

(Testimony of Dr. Melvin M. Graves.)

over half of those will be due to pulmonary embolism.

Q. Over fifty per cent of post-operative deaths in hernia cases are due to pulmonary embolism?

A. Yes, sir.

Q. What effect does the age group have upon the expectancy of death from pulmonary embolism in hernia operations?

A. The expectancy is much greater in older age groups.

Q. What about a person sixty-one years old, what about that age group?

A. It would be four or five times more than in the third decade. [98]

Q. A surgeon would expect four or five times as great a number of embolisms in that age group than in the younger group?

A. Yes.

Q. Where is the most prevalent origin of embolus that might result in pulmonary embolism?

A. The best information gathered from autopsy statistics seem to point to the lower veins. In the calf muscles; the tibia which is the bone between the knee and the ankle, that is the most prevalent—the place where the thrombi arises.

Q. Can they arise from immobilization?

A. Yes, sir, they can.

Q. Regardless of surgery?

A. Yes, sir, that's right.

Q. In post-operative procedure or treatment is the use of opiates common?

A. Yes, sir.

Q. And sedatives.

A. Yes, sir.

Q. What does sedatives do to a person—a patient?

(Testimony of Dr. Melvin M. Graves.)

A. It allays pain and depresses centers of the nerve system.

Q. And brings about relaxation?

A. Yes, sir.

Q. What does it do to the breathing where a person is under [99] opiates?

A. It tends to slow the respiration if it was an opium.

Q. Did you examine the hospital record in this case? A. I did, I think it was pantopon.

Q. What effect would that have as to relaxation?

A. That might produce considerable relaxation and tends to slow the respiration.

Q. What happens with reference to secretion and mucous draining to the trachea where a person is under that type of opiate and sedative?

A. It may tend to run down the trachea more than if the patient was awake.

Q. Is that the common and natural procedure and consequence in case of opiates following surgery?

A. Yes, sir.

Q. Doctor, will you explain snoring?

A. It is caused by a relaxation of the jaw muscle which allows the mouth to open. Usually it is associated with an obstruction in the nasal cavity and the passing of air in this manner causes the soft palate to vibrate and the tongue may also drop backward which contributes to the noise.

Q. Would that increase or decrease the mucous draining to the trachea? [100]

A. It has been my observation that most patients

(Testimony of Dr. Melvin M. Graves.)

who have been breathing that way, they tend to have a dry mouth because the air is not going through the nasal passage which is a humidifier and gets moisture in the air.

Q. When a person isn't under opiates and this mucous drains down the trachea what does he do?

A. He wakes with a start and tries to cough it up.

Q. When he isn't asleep?

A. He coughs it up.

Q. That is the mechanism to clear the trachea?

A. That's right.

Q. When he is under opiates that continues to drain?

A. Yes, sir.

Q. The mechanism for bringing it up isn't working?

A. It may not.

Q. Because of his being under the opiate.

A. That's right, that may contribute to it.

Q. When he wakes what is the post-operative treatment as to advising the patient what to do?

A. To turn this patient from side to side and encourage the patient to cough this material up.

Q. And what happens if that is not done?

A. This mucous may get to the smaller bronchi—the smaller air passage and it may lead to atelectasis.

Q. What is that? [101]

A. It is a collapse of the lung.

Q. And results in what?

A. You have a very ill patient and they may, if infection develops on top of the atelectasis, they may die.

Q. It is proper procedure to urge them to cough

(Testimony of Dr. Melvin M. Graves.)

and bring up the mucous? A. That is right.

Q. Did you check the hospital record here, exhibit 7?

A. I checked a photographic replica of it.

Q. Can you tell from that record when Mr. Wilson started to deteriorate?

A. It appears that about 12:30 the respiration seemed to change in character and become irregular and cyanosis was noted at that time. That is apparently when the major trouble started.

Q. From an examination of that record, exhibit 7, could you ascertain the cause of Mr. Wilson's death? A. No, I couldn't.

Q. Assuming that he died at five a.m. April 8, 1948, in the light of that record, from what cause could he have died?

A. He could have died from cerebro vascular thrombosis, — embolism; coronary thrombosis, embolism or pulmonary embolism.

Q. Acute heart failure? [102]

A. That is possible.

Q. Could the cause of his death be determined other than by autopsy?

A. In my opinion, no.

Q. When immobilization takes place for any period of time just state in a general way the effect upon the circulatory system will you Doctor, can you give the process of building up an embolism or thrombus if it has a tendency to do that?

A. Of course, immobilization means putting a

(Testimony of Dr. Melvin M. Graves.)

person at rest, bed rest, and such a situation leads to stasis of the blood.

Q. What do you mean by stasis?

A. The blood slows down in the rate of flow, or stops flowing. This creates, particularly in the veins of the leg—and the reason for this is the return of blood from the lower extremities is not a simple process, it is necessary that the lower extremities be moving, tracting of the muscles helps to propel the blood to the heart. If you have a patient in bed this rate of flow may slow down and it may stagnate.

Q. Where surgery is performed what effect does that have on stagnation in the abdominal and pelvic region and the lower extremities.

A. You have to give some form of anesthesia to place that patient at rest and during that time the circulation [103] becomes poor.

Q. It slows the circulation. A. Yes, sir.

Q. What does slow circulation do with reference to being a factor in the creation of emboli?

A. It is a major contributing factor. If there is a slight defect in the lining of the vessel, which is common in older people, this slow moving blood is much more likely to clot at that point.

Q. Suppose there is a thrombosis, what effect does the stagnation of the blood and immobilization have on that breaking?

A. Stagnation allows that clot to build up and become larger.

Q. And then break away.

A. In the direction of the heart until it gets to

(Testimony of Dr. Melvin M. Graves.)

the next major branch. It is like a network of rivers and creeks, a clot is created at a certain point and then this will and does go back to the next largest tributary of the system. It gets into the circulation or the circulatory system.

Q. A thrombosis is attached to a major vessel?

A. Sometimes loosely attached.

Q. What causes it to break away?

A. Muscular activity.

Q. Doctor, what about the condition of the venous system [104] being a separate disease entity?

A. I don't see what you mean.

Q. Is it a co-existing condition?

A. Well, it is one of the systems of the body that has disease processes.

Q. Tell us, Doctor, about the disease process in the veins that is a co-existing condition with surgical procedure?

A. If I understand you—an individual may have little plaques in these veins and you put him in bed for any reason—for a major operation or anything; you immobilize him; that leads to a stasis of the blood in these veins which may lead to thrombosis at the site of this abnormality in the vessel wall. It eventually gets back to this next major tributary as I said and at sometime with what is characterized as a severe muscular strain this clot breaks off and goes into the general circulation; it gets into a vessel that supplies the lung and if it is large enough to occlude this vessel the patient dies; if it is smaller and goes into a smaller vessel of the lung he may cough up blood.

(Testimony of Dr. Melvin M. Graves.)

Q. Can this be designated as a disease process of the veins? A. Of the venous system.

Q. That is co-existing at the time of the surgical procedure? A. Yes, sir.

Q. Can there be a thrombosis or clot remain after surgical operation that is not torn loose but remains in the [105] vessel itself? A. Yes, sir.

Q. That can be loosened later?

A. Ordinarily when a clot remains for any length of time it undergoes reorganization as we say. It becomes definitely attached to the vessel and new blood vessels grow into it. That makes new small vessels through that clot.

Q. But it could break away?

A. Within a certain length of time.

Q. A year?

A. I would say that is a little long. I would say not over three or four months.

Q. Following herniorrhaphy, in your opinion, would death following an embolism be the result of the herniorrhaphy? A. Yes, I think it would.

Q. Explain why?

A. If a man has an inguinal hernia and on physical examination you find he is in reasonably good health; you admit him to the hospital, you admit him for operative treatment; you are going to repair it by surgery; that is the disease for which he is admitted to the hospital. If he dies from some secondary event the hernia for which he is admitted is the principal cause of death and the terminal event is a contributing cause of death.

(Testimony of Dr. Melvin M. Graves.)

Q. Would any effect that was dependent upon the venous system [106] be incidental to that surgical procedure? A. Yes.

Q. And co-existing with it? A. Yes, sir.

Q. Under those conditions would you say that the hernia was the contributing cause?

A. I would say it is the principal cause; no hernia, no death. If it had not been that he was admitted to the hospital for treatment for hernia he would not have died.

Mr. Eberle: I believe that is all.

By Mr. Merrill:

Direct Examination

Q. Doctor, assuming that the man died of pulmonary embolism—withdraw that please—Doctor, I understood you to say you studied the chart and the deposition of Doctor Gill? A. Yes, sir.

Q. From such information as you were able to get from that study one cannot say that he died from pulmonary embolism, is that right?

A. I cannot say that.

Q. Would you say that the average practitioner would be able to say that; one skilled in surgery would he be able to say that?

A. In my opinion it would be necessary to have an autopsy.

Q. If he died from pulmonary embolism, would the operation [107] for hernia twenty hours earlier be a contributing cause?

A. In my opinion it would be the chief cause.

(Testimony of Dr. Melvin M. Graves.)

Q. If there had been no hernia there would have been no operation? A. That is right.

Q. If there was no operation there would be no embolism. A. That is right.

Q. If there had been no embolism there would have been no death? A. That is right.

Q. So death was directly caused by the hernia?

A. That is my opinion.

Q. Hernia was a bodily infirmity?

A. That is right.

Mr. Merrill: That is all.

Mr. Davis: No questions.

Mr. Eberle: I would like to have published the deposition of Doctor Beeman, Doctor Swindell; Doctor Pittenger and Doctor James L. Stewart.

Mr. Davis: They can be considered as read from the witness stand, as far as I am concerned.

The Court: Then it will be understood that the Court Reporter can copy them into the record.

Mr. Merrill: With like effect as if read at [108] this time and as if the witness was on the stand.

The Court: It will be understood that the Court reporter can copy them into the record with that effect, Mr. Merrill.

Mr. Davis: We haven't made any objections throughout the depositions.

The Court: And you have read the depositions, Mr. Davis?

Mr. Davis: Yes, Your Honor, and I waive any objection to any one of those questions.

DR. JOSEPH BEEMAN

After being first duly sworn, testifies as follows on behalf of the defendant.

Direct Examination

By Mr. Eberle:

Q. Will you state your name?

A. Joseph Beeman.

Q. Where do you reside?

A. Boise, Idaho.

Q. And your profession?

A. Physician and surgeon.

Q. State generally your formal qualifications your education?

A. I graduated from the University of Oregon Medical School in 1937. I have had post graduate training in pathology. [109] I am a certified specialist in pathology, certified by the American Board of Pathology and a member of the American College of Pathologists.

Q. You are licensed to practice medicine in Idaho?

A. Yes, sir.

Q. Were you an instructor in pathology at Oregon? A. Yes, sir, 1939 to 1946.

Q. Did you practice pathology in Oregon?

A. Yes, sir.

Q. During what period did you practice pathology in Oregon? A. 1937 to 1946.

Q. You came to Idaho in 1946?

A. Yes, sir.

(Testimony of Dr. Joseph Beeman.)

Q. And since then you have practiced in Boise?

A. Yes, sir.

Q. What official position do you hold here in Boise?

A. Attending pathologist at St. Lukes and consulting pathologist at the Veterans Administration, Boise.

Q. Since 1946 have you performed any autopsies in southern Idaho?

A. Yes, sir.

Q. About what percentage of the autopsies have you performed in Boise?

A. I would say about sixty per cent. [110]

Q. Of all autopsies performed.

A. Yes, sir, in Boise, in other communities I am not familiar.

Q. Now, Doctor, can you give us the approximate number you have had since you have been in Boise?

A. Probably between a hundred and a hundred fifty.

Q. Autopsies.

A. Yes, sir.

Q. You have also done autopsies elsewhere?

A. Yes, sir.

Q. Give the approximate number?

A. Something over two thousand.

Q. Have you read the deposition of Dr. O. F. Call, taken in this case?

A. I have read it, yes, sir.

Q. And have you examined the hospital record referred to in this deposition, as exhibit A?

A. Yes, sir.

(Testimony of Dr. Joseph Beeman.)

Q. Now, Doctor, will you briefly describe what is known as embolism?

A. An embolism is the plugging of a hole or the hole in an artery due to foreign materials or due to fragments of blood clot which arises in another primary source.

Q. And what is a pulmonary embolism?

A. A pulmonary embolism is the plugging of the hole in the [111] pulmonary arteries by a foreign material or blood clot which arises from some other source. The pulmonary arteries are the large blood vessels leading from the heart to the lungs supplying the lungs with blood.

Q. Can you distinguish for us embolism and thrombosis? A. Yes, sir.

Q. Do so.

A. Well, a thrombus is a clot of blood inside a blood vessel during life; an embolus is a portion of this blood clot or other foreign material which is set loose in the blood stream and travels through the blood stream. In other words, a thrombus is a clot in the vessel wall, whereas, an embolus is a moving particle of this clot or other foreign body.

Q. Is the symptomatology similar in the case of death of pulmonary embolism and death as a result of coronary thrombosis?

A. The symptoms of death from pulmonary embolism and death from coronary thrombosis may be quite similar.

Q. Doctor, is the case of post-operative death occurring approximately twenty hours after surgery,

(Testimony of Dr. Joseph Beeman.)

Q. In your opinion, can it be determined whether such death occurred as a result of pulmonary embolism or coronary thrombosis without an autopsy?

A. In my opinion it cannot. [112]

Q. Does a pulmonary embolism originate in the venous portion of the vascular system?

A. Yes, sir.

Q. State just how pulmonary embolism arises in the venous system, will you Doctor?

A. A pulmonary embolism arises in the venous system either by introduction of foreign material such as oil or air into the venous circulation or due to disease of the venous circulation, caused by stagnation of blood, infection or injury; blood clots in the venous system with a resulting venous thrombus; particles of this thrombus or blood clot in the venous system become detached and travel through the veins to the right side of the heart and from there are propelled into the pulmonary arteries causing a blocking of these arteries, or pulmonary embolism.

Q. Assuming, Doctor, that Harry H. Wilson, referred to in the deposition of Dr. O. F. Call, died of a pulmonary embolism approximately twenty hours after a hernia operation, referred to in said deposition, which took place on April 7, 1947. In your opinion would prior surgery, referred to in said deposition, including a hernia operation upon the man have any effect upon such a pulmonary embolism?

A. In my opinion, yes.

Q. In what way?

A. For the reason that an operation for intestinal

(Testimony of Dr. Joseph Beeman.)

obstruction [113] and repair of the hernia could easily have caused a venous thrombus at that time, and the hernia operation on April 7, 1947, may have been the exciting factor in causing this venous thrombus to break down and form a pulmonary embolism.

Q. Doctor, in your opinion is a pulmonary embolism a probable result of a hernia operation?

A. Yes, sir, a pulmonary embolism may be anticipated and expected following a hernia operation or any other abdominal surgery.

Q. Doctor, in your opinion can a pulmonary embolism come from immobilization at the time of the surgical procedure?

A. Yes, sir, for the reason that immobilization during and following surgical procedure, as well as the effect of the anesthetic tends to cause stagnation of the blood in the veins—in the venous system and this stagnation is one of the major causes of venous thrombus and venous thrombus is likewise the major cause of pulmonary embolism.

Q. Doctor, where a hernia operation has been skillfully performed, in your opinion, would a pulmonary embolism be a natural result of the immobilization incident to the surgical procedure?

A. Yes, sir.

Q. Just explain in what way such result would be a natural consequence?

A. The immobilization of the patient with resulting stagnation [114] of blood may in itself cause venous thrombus with resultant pulmonary embolism.

(Testimony of Dr. Joseph Beeman.)

Q. Now, Doctor, referring to the hospital chart or record marked exhibit "A" and from an examination of the hospital record marked "a" when did the process which terminated in death commence?

A. The nurse's notes, beginning at 12:30 a.m. Tuesday, April 8, 1947, indicated that at that time the patient became cyanotic, had irregular respiration and from this time until his death at 4:45 a.m. the nurse's notes indicate the patient progressed into death.

Q. Doctor, from an examination of the hospital record exhibit "A" can one, in your opinion, reasonably conclude that death was a result of pulmonary embolism?

A. From an examination of the record Exhibit "A," in my opinion, I cannot conclude the cause of death, whether from pulmonary embolism or other causes.

Q. Can you conclude from an examination of exhibit "A" that Harry H. Wilson died of a pulmonary embolism? A. No.

Q. Now, Doctor, in your opinion, is post-operative pulmonary embolism reasonably foreseeable?

A. Yes, sir.

Q. It is sufficiently foreseeable that precautions are taken to avoid it? A. Yes, sir. [115]

Q. Assuming the facts stated in the deposition of Doctor Call, and in the hospital record exhibit "A" to be true, and that Harry H. Wilson died about five o'clock a.m. on April 8, 1947, of a pulmonary embolism, in your opinion, was such an embolism, under such circumstances reasonably foreseeable?

(Testimony of Dr. Joseph Beeman.)

A. Yes, under the facts as given, a pulmonary embolism should have been looked for and anticipated.

Q. Now, Doctor, is a post-operative pulmonary embolism a natural result or consequence of surgical procedure or immobilization?

A. Assuming skillful surgery without a large amount of manipulation and injury, the pulmonary embolism is a result of co-existing disease process in the venous system and a natural result of surgery or immobilization.

Q. Now, Doctor, in case of inguinal hernia where the operation was skillfully performed without any unusual incident, the operation being very smooth, would there be any large amount of handling or injury such as you mentioned above? A. No.

Q. Doctor, assuming the facts in the deposition of Doctor Call and the hospital record exhibit "A" to be true, and that Harry H. Wilson died of a pulmonary embolism at five o'clock a.m. April 8, 1947, would such an embolism be anticipated under such circumstances?

A. Yes, sir, in any surgical procedure a pulmonary embolism [116] should be anticipated.

Q. Now, Doctor, is a post-operative pulmonary embolism accidental?

A. In my opinion post-operative pulmonary embolism is not accidental for the reason that it arises from a diseased process of the venous system and is anticipated.

Mr. Eberle: That is all, thank you, Doctor.

DR. O. F. SWINDELL,

Called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Eberle:

Q. State your name? A. O. F. Swindell.

Q. You reside at Boise? A. Yes, sir.

Q. And your profession? A. Medicine.

Q. You are licensed to practice medicine in the State of Idaho. A. Yes, sir.

Q. State briefly your formal qualifications?

A. My education and so forth, you mean.

Q. Yes.

A. Graduated from Jefferson Medical, Philadelphia, in 1926. Served two years in the Philadelphia General Hospital and came to Idaho in 1928, entered the practice with Dr. [117] E. Laubaugh and practiced with him until 1933 and since that time I have practiced internal medicine in my own office in Boise.

Q. You are practicing internal medicine, specializing in that? A. Yes, sir.

Q. You have been Chief of Staff at St. Luke's hospital?

A. Yes, sir, two or three years during the war.

Q. It was about 1942 to 1945.

A. I think that is right and I was also president of the State Medical Association at one time.

Q. Have you read the deposition of Dr. Call in this case? A. Yes, sir.

Q. Have you examined the hospital record re-

(Testimony of Dr. O. F. Swindell.)

ferred to in the deposition of Dr. Call's as exhibit "A"? A. Yes, sir.

Q. Doctor, can you describe briefly and in as much lay language as possible the nature and description of pulmonary embolism?

A. Pulmonary embolism is the result of a blood clot which becomes free in the blood stream and is carried to the lungs by way of the heart to the pulmonary artery, lodging in a vessel in the involved lung. I might qualify that by saying that a clot or other foreign body. Anything can produce it besides a clot.

Q. Doctor, can you tell us briefly about a thrombus or thrombosis?

A. A thrombus is a clot, a blood clot which forms within a [118] vessel resulting in an obstruction of the vessel at the site of its formation.

Q. Is there any substantial difference in the symptomatology of a pulmonary embolism and a thrombus? A. No.

Q. The embolism arises in the venous system, is that correct?

A. Yes, it could arise in the venous system or arterial system or it may arise in the heart.

Q. All pulmonary embolisms arise in the venous system, is that right?

A. Or the right side of the heart which is theoretically a part of the venous system.

Q. Can you distinguish between coronary thrombosis and pulmonary embolism?

A. Both conditions produce obstruction to the

'(Testimony of Dr. O. F. Swindell.)

involved vessel. In a pulmonary embolism the involved vessel is in the lung in coronary thrombosis the embolism is in one of the coronary vessels of the heart. Symptomatically they are difficult to distinguish.

Q. Can you tell the difference in the origin of the clot in those two, coronary thrombosis and pulmonary embolism?

A. In coronary thrombosis the clot originates in the coronary artery; in pulmonary embolism the clot originates either in the heart or in the venous system.

Q. Can you describe briefly how and in what manner embolism [119] originates in the venous system?

A. When the embolus originates in the venous system there is first formed a thrombus; portions of this thrombus break off and float free in the blood stream producing an embolus.

Q. Can these particles break loose as an incident to surgical procedure? A. Yes, sir.

Q. That would be due to trauma or ligation?

A. Due to a number of factors, one is trauma from surgery, another is immobilization of the patient in bed, other contributing factors are the age of the patient and his general condition at the time of the operative procedure.

Q. Now, Doctor, is pulmonary embolism a reasonably foreseeable thing? Is pulmonary embolism reasonably foreseeable from surgical procedure and immobilization?

(Testimony of Dr. O. F. Swindell.)

A. Any patient who is operated on presents a potential case for pulmonary embolism.

Q. When you mention operations you include operations for hernia.

A. Any kind of operation.

Q. Would the same be true of immobilization as incident to surgical procedure?

A. Yes, immobilization predisposes to the formation of thrombi and emboli. [120]

Q. In your opinion pulmonary embolism is a risk or hazard in every case of surgical procedure or immobilization? A. Yes, sir.

Q. Is there any preventative to prevent or mitigate pulmonary embolism? A. Yes, sir.

Q. In your opinion is this procedure based upon the fact that pulmonary embolism is reasonably foreseeable in any of these cases?

A. Yes, sir, I think so. Most surgeons use a measure to prevent emboli in the case of every post operative patient.

Q. Including operations for heria.

A. Yes, sir, including operations for hernia.

Q. Doctor, from an examination of the hospital record exhibit "A", in your opinion is there anything to indicate that the death of Harry H. Wilson was due to pulmonary embolism?

A. The record indicates that the man died very suddenly and death from pulmonary embolism or pulmonary emboli can be sudden, but sudden death doesn't indicate that the man died from pulmonary embolism.

(Testimony of Dr. O. F. Swindell.)

Q. The record, in your opinion would be symptomatic of what?

A. The record mentions that the patient had irregular breathing and irregular pulse, that he was restless. The irregular pulse would indicate that there was some heart disturbance at this time; irregular respiration could be a result [121] of a heart disturbance or the result of administration of drugs to control pain.

Q. In your opinion is a post operative pulmonary embolism accidental?

A. No, I don't think it is.

Q. Will you just state your reasons, briefly?

A. Post operative embolism is something which surgeons think of or anticipate prior to and after surgery. They all take certain measures to reduce the chances of post operative pulmonary embolism.

Q. Is it one of the natural consequences of every surgery or immobilization?

A. Yes, I think it is.

Q. Whenever you say surgery that includes hernia operations?

A. It includes all operations whether it is hernia or anything else.

Q. Doctor, in your opinion are post operative deaths following hernia operations more prevalent than in other surgical procedure?

A. The only comparison is in Cecil's Text Book of Medicine in which he states that pulmonary emboli following operations for hernia are five times more frequent than in operations for appendicitis except in cases where the appendix is ruptured.

Q. Is Cecil's Text Book of Medicine a recognized authority [122-3] in the medical profession?

A. Yes, sir, it is.

Q. Doctor, assuming the facts stated in Doctor Call's deposition and the hospital record, exhibit "A" referred to in such deposition to be true and that Harry Wilson died about five o'clock a.m., April 8, 1947, of a pulmonary embolism. In your opinion was such embolism to be anticipated as a natural and probable result of the surgical procedure mentioned in such deposition and in Exhibit "A", and was it reasonably foreseeable?

A. Yes, sir, in that we know that a certain percentage of all surgical cases have emboli and this percentage is particularly high in the age group in which this patient falls.

Q. Assuming, Doctor, that Harry Wilson died of a coronary thrombosis, in your opinion, would such thrombosis be accidental? A. No.

DR. F. A. PITTENGER

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Eberle:

Q. State your name Doctor?

A. F. A. Pittenger.

Q. You live in Boise. [124] A. Yes, sir.

Q. Your profession?

A. Physician and surgeon.

Q. You are licensed to practice in Idaho?

A. Yes, sir.

(Testimony of Dr. F. A. Pittenger.)

Q. State your formal qualifications, briefly?

A. Well, I have practiced medicine for forty-nine years, ninety per cent of my practice has been surgery.

Q. Your education and training?

A. Graduated from two schools and served an internship, worked for a physician four years on a salary; associate professor of surgery in Honaman Medical in Chicago.

Q. You have been Chief-of-Staff at St. Alphonsus Hospital for a good many years?

A. Twenty-two years.

Q. Doctor, in your half century of surgical practice how many cases of surgery would you say you have had?

A. Oh, I don't know, but many thousands.

Q. Doctor, in your long career as a surgeon you have become familiar with the cause and effect of embolisms.

A. Yes, sir.

Q. Also pulmonary embolisms?

A. Yes, sir.

Q. Will you just state briefly where a pulmonary embolism comes from, Doctor? [125]

A. In case of surgery it ordinarily comes from the site of the operation where a blood clot has formed, this clot, or a portion or fragment of the clot has gotten into the circulation and it continues in circulation until it becomes fastened to the channel in which it is circulating, that is, it gets in a smaller channel where its size prevents its continuing.

Q. Doctor, it is not a fact in the case of surgery, embolism may also come from the fact that the patient

(Testimony of Dr. F. A. Pittenger.)

is immobilized? A. That is right; yes, sir.

Q. In your opinion, Doctor, is a pulmonary embolism accidental, is it an accident?

A. In my opinion it is not.

Q. State your reasons for **that answer.**

A. My personal interpretation of an accident is that it is an unusual and unexpected incident and causes a catastrophe of some degree. Pulmonary embolism following surgery or a surgical operation in the nature of a hernia or pelvic operation is not unexpected because statistically it is the largest single cause of death following surgical operations such as I mentioned. To all men doing major surgery that is one of the biggest hazards in the procedure. He always has that in mind and is on the lookout for that sort of thing, consequently I don't consider it unexpected.

Q. Doctor, would you say in your opinion that pulmonary [126] embolism is reasonably foreseeable?

A. No, I don't think it is reasonably foreseeable, but it is reasonable to expect one.

Q. It is reasonably expectable?

A. Yes, sir.

Q. Are there preventative measures to eliminate or mitigate such embolisms?

A. Recently there has been an effort to use medication which the profession thought might have some bearing on the formation of embolisms, to prevent the formation of the embolus; then there is the after treatment in which we mobilize the patient through some form of movement that will help the circula-

(Testimony of Dr. F. A. Pittenger.)

tion; to guard against complete immobilization, and after the damage is done sometimes efforts are made to prevent further embolisms or embolus. I know of no method possible to use in all cases because the end result is that they are more or less hazardous in themselves.

Q. Doctor, isn't it a fact that fifty per cent of post operative deaths are due to embolism?

A. Yes, that is practically correct.

Q. Have you read the deposition of Doctor Call, in these cases? A. Yes, sir.

Q. Have you examined the hospital record Exhibit "A"? A. Yes, sir. [127]

Q. Assuming the facts therein to be true and that Harry Wilson died at about five o'clock a.m., April 8, the morning after the operation, in your opinion was the pulmonary embolism accidental, was it an accident?

A. Not under my interpretation of an accident.

Q. Would you say under those facts the pulmonary embolism was probable and to be anticipated and expected? A. It was to be anticipated.

Q. And expected.

A. Yes, and expected.

Q. Doctor, from an examination of the hospital record, Exhibit "A" from midnight on April 7th, to the time of his death, in your opinion, was there a condition of profound shock? A. Yes, sir.

Q. Would this be a symptom of pulmonary embolism and could it be symptomatic of coronary thrombosis? A. Yes, sir, it could.

Q. Will you explain that answer?

(Testimony of Dr. F. A. Pittenger.)

A. I am unable to tell from the records to my own satisfaction whether this was a pulmonary embolism or some other type of chest embolus.

Q. Doctor, assuming that the patient Harry Wilson was operated on for hernia about eight or nine o'clock on the morning of April 7, and that he died of pulmonary embolism about [128] five o'clock on the morning of the 8th. If he did die from such embolism would the operation for hernia be a contributing cause? A. Yes, sir.

Q. Assume Doctor, that Harry H. Wilson was suffering from hernia and that he was operated on for such a hernia and his death followed within approximately twenty hours thereafter, either from pulmonary embolism or some other similar cause, would the fact that he was operated on for hernia be a contributing cause of his death?

A. Yes, sir.

Q. Doctor, state whether or not the hernia sustained by Mr. Wilson as disclosed by the testimony of Doctor Call and the Exhibit "A" introduced in evidence, was a contributing cause of the death of Harry H. Wilson? A. Yes, sir.

Q. Doctor, in your opinion, are post operative deaths in the case of hernia and other pelvic operations more prevalent than other types of operations?

A. Yes, sir, they are. They are more prevalent than in other general operations.

Q. In your opinion Doctor, is post operative embolus a natural consequence of surgical procedure and immobilization incident thereto?

A. Yes, sir. [129]

Q. And post operative pulmonary embolism is reasonable foreseeable in the sense that it is expected?

A. Yes, they are expected.

Q. If post operative pulmonary embolism is an accident what would you say as to other causes of death?

A. All deaths are accidental if that is true.

Q. But you don't think it is true.

A. I don't believe it is true.

Mr. Eberle: That is all Doctor.

JAMES L. STEWART

Called as a witness by the defendant, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Eberle:

Q. State your name Doctor?

A. James L. Stewart.

Q. Your profession.

A. Physician and surgeon.

Q. You live in Boise? A. Yes, sir.

Q. You are licensed to practice in Idaho.

A. Yes, sir.

Q. State briefly your educational qualifications?

A. I graduated from Rush Medical College, University of Chicago in 1899.

Q. Where have you practiced? [130]

A. One year in Nebraska, a year and a half in Chihuahua, Mexico, and since March, 1902, in Boise.

Q. In your forty-six years in Boise have you specialized in surgery?

A. Yes, most of that time.

(Testimony of James L. Stewart.)

Q. You have performed many thousands of operations?

A. Yes, there are some twenty thousand histories on file in there now.

Q. You were Chief-of-Staff at St. Luke's Hospital for how many years, Doctor?

A. Chief of the organized staff for twenty-nine years and Chief of the hospital thirty-four years.

Q. In your practice of surgery you are familiar with embolisms and particularly pulmonary embolisms?

A. Yes, sir.

Q. Doctor, in your opinion where a hernia operation was skilfully performed without unusual incident and death occurred within twenty hours after the operation, would you say that such embolism was accidental, if death was from pulmonary embolism?

A. No, I don't think I could say that.

Q. Would you say it was expected?

A. It is something that could be expected in a certain number of cases.

Q. Post-operative pulmonary embolism is something that is [131] reasonably foreseeable?

A. Yes, sir, it is foreseeable.

Q. Are pulmonary embolisms more prevalent in hernia and pelvic operations than in other general operations?

A. Yes, more so than in other classes of operations; next in line would be fractures.

Q. Is there preventative procedure to prevent or mitigate pulmonary embolism?

(Testimony of James L. Stewart.)

A. There is an effort to do that by the use of heparin and dicumerin and certain post-operative exercise; the use of the legs, sitting up in bed and so forth, but none are very effective.

Q. Doctor, you have read the hospital record as a part of the deposition of Doctor Call, which is marked as exhibit "A"?

A. Yes, I have.

Q. From an examination of that record can you tell us what it shows with reference to the diagnosis of the cause of Mr. Wilson's death?

A. I would say that it is not clear from the record here that the patient dies from pulmonary embolism, but rather that he had a progressive heart failure as indicated by the irregular pulse and the type of respiration which resembles Cheyne-Stokes respiration.

Q. Just explain to us the symptomology as indicated by this report. [132]

A. Well, the symptomology is that there was a slight increase in temperature, diaphoresis,—that is sweating; irregular pulse and the Cheyne-Stokes type of respiration would point more to progressive heart failure. The ordinary symptoms of pulmonary embolus are pain in the chest, some coughing and small amount of blood frequently, with difficulty of breathing and secondary heart failure.

Q. Now, Doctor, in a clean surgical case where the operation was skilfully performed without incident, tell us the percentage of deaths,—of all post-

(Testimony of James L. Stewart.)

operative deaths, that are due to pulmonary embolism.

A. Well, I don't know the exact percentage, but I would say it is very high, perhaps seventy or eighty.

Q. Seventy or eighty per cent of all post-operative deaths, where the operations are skilfully performed and are clean operations, are due to pulmonary embolism?

A. I should also say pulmonary embolisms or cerebral embolism.

Q. Going back to exhibit "A," can you tell us whether in your opinion the reference to a heart condition during the last six or seven hours before death indicated a weakness of the heart muscles or pulmonary embolism?

A. I should say it indicated a weakness of the heart muscle.

Q. Where there is a weakness of the heart muscle, is there also a natural consequence from surgical procedure that might result in death without a pulmonary embolism? [133]

A. Yes, sir.

Q. State what happens.

A. The condition of secondary shock might occur due to the general condition of the patient.

Q. And his heart would not stand the shock of the surgery?

A. That is right; yes, I might say that.

Q. Now, Doctor, in view of the hospital record, in your opinion, could the cause of his death be correctly diagnosed without an autopsy?

(Testimony of James L. Stewart.)

A. No.

Q. Assuming that Mr. Wilson was sixty-one years of age at the time of death, what would you say as to whether post-operative pulmonary embolism would be more probable and expected in his case than in that of a younger person?

A. No, I don't think so, because it occurs in all ages.

Q. Assuming, Doctor, that Harry H. Wilson was afflicted with a hernia and that he was operated on for this hernia at about eight o'clock or nine o'clock a.m., April 7, 1947, and that he died a little before five o'clock a.m. April 8, 1947, from pulmonary embolism or coronary embolism, would hernia and the treatment therefor be a contributing cause to his death?

A. Yes, sir.

Q. Would the operation for the hernia under such condition and the existence of the hernia be a contributing cause [134] to his death, if he had died from other causes?

A. Yes, sir, it would.

Q. State whether or not the fact that he had a hernia and was operated for the hernia and subsequently died be in and of itself a contributing cause to his death?

A. Yes, sir.

Q. Is embolism a natural consequence of operative procedure or immobilization, where it occurs?

A. It is in certain instances. It does occur.

Q. It is a natural consequence of operative procedure or immobilization, where it occurs?

A. It is in certain instances. It does occur.

Q. It is a natural consequence where no inter-

(Testimony of James L. Stewart.)

vening factor takes place such as infection or unskillful procedure? A. Yes, it occurs.

Q. Doctor, having considered the testimony of Doctor Call, and the hospital record as shown by exhibit "A", state whether the death of Harry H. Wilson was caused wholly or partly, or the result contributed to by the existence of the hernia and the treatment therefor?

A. Yes, it was.

Mr. Eberle: I think that is all, thank you, Doctor. The defendant rests.

Mr. Davis: No rebuttal. [135]

State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the duly qualified and appointed official Court Reporter of the United States District Court for the District of Idaho; that I reported in shorthand the evidence and proceedings had in and about the trial of the above-entitled cause, and thereafter transcribed in longhand (typewriting) the same, and that the foregoing transcript is a true and correct transcript of the testimony given and the proceedings had in and about the trial of the said cause.

In Witness Whereof I have hereunto set my hand this 16th day of August, 1948.

/s/ G. C. VAUGHAN,
Official Reporter.

[Endorsed]: Filed August 19, 1948.

[Endorsed]: No. 12227. United States Court of Appeals for the Ninth Circuit. New York Life Insurance Company, a Corporation, Appellant, vs. Cecelia J. Wilson, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed April 15, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12227

CECELIA J. WILSON,

Respondent,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Appellant.

ADOPTION OF STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Appellant, having heretofore filed its Statement of Points and Designation of Record on appeal, specifying the complete record and all proceedings and evidence to be contained in the record on appeal, which Statement of Points and Designation are specified to be included in the record on appeal,

the points set forth in such statement of points appearing in such transcript are hereby adopted by appellant as its points on appeal and the complete record and all proceedings in evidence, as certified to the Clerk of the above-entitled Court, is hereby designated for printing in its entirety.

/s/ J. L. EBERLE,

/s/ B. S. VARIAN,

/s/ DALE O. MORGAN,

Attorneys for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 25, 1949. Paul P. O'Brien, Clerk.